88-242

No. 88-

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARJORIE LINDER COOLEY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
CLIFTON POWER CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the voluntary submission of a license application gives the Federal Energy Regulatory Commission jurisdiction over one of a class of hydroelectric projects that two courts of appeals have held is beyond the Commission's authority under the Federal Power Act.

PARTIES TO THE PROCEEDING BELOW

The following parties and intervenor appeared before the court of appeals: Marjorie Linder Cooley, a private citizen; Clifton Power Corporation; and the Federal Energy Regulatory Commission.

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MARJORIE LINDER COOLEY,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marjorie Linder Cooley respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 843 F.2d 1464. The Order Denying Rehearing of the Federal Energy Regulatory Commission (App. B, *infra*) is reported at 39 F.E.R.C. ¶ 61,117. The Commission's Order Issuing License (Minor) (App. C, *infra*) is reported at 35 F.E.R.C. ¶ 61,303.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988, when the opinion of the court was docketed. On July 7, 1988, the Chief Justice extended the

time for filing a petition for a writ of certiorari to and including August 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 4(e) and 23(b) of the Federal Power Act, 16 U.S.C. §§ 797(e) and 817, are set out in Appendices D and E, *infra*.

STATEMENT OF THE CASE

This case arises from an attempt by respondent Clifton Power Corporation to obtain a license from respondent Federal Energy Regulatory Commission in order to condemn the property of petitioner Cooley.

Clifton Power owns and operates a hydroelectric project constructed prior to 1935 on a nonnavigable stream. Such projects have been consistently held to be beyond FERC's jurisdiction under the Federal Power Act.

After the federal district court in South Carolina enjoined Clifton Power from flooding Cooley's land, Clifton earnestly sought a FERC license for its project, because it could then condemn Cooley's property and thereby negate the injunction entered against it.

Notwithstanding the clear statutory limits on its jurisdiction, FERC ruled that it had authority to license the project, essentially because Clifton Power wanted one. The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

The Federal Water Power Act of 1920, 41 Stat. 1063, generally prohibited the unlicensed construction of hydroelectric projects located on public lands or navigable waters of the United States. Under the 1920 Act, developers were free to construct and operate projects on nonnavigable waters pursuant to state law, without seeking federal authorization. In 1935, Congress amended

section 23(b) of the Act, 16 U.S.C. § 817, to prohibit the construction and operation of virtually all hydroelectric projects, including those on nonnavigable waters, in the absence of a license issued by the Federal Power Commission, FERC's predecessor. The Courts of Appeals for the Second and Ninth Circuits subsequently held that Congress intended the 1935 amendments to be prospective only, and that no license was required for a project constructed on nonnavigable waters prior to 1935, *Farmington River Power Co. v. FPC*, 455 F.2d 86 (2d Cir. 1972), even if the project was taken out of service and then restored to operation after 1935, *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311 (9th Cir. 1977).

There exists a large class of projects that, like Clifton Power's, were constructed prior to 1935 in nonnavigable streams.[1] The project owners in the *Farmington* and *Puget Sound* cases successfully contested the Commission's licensing jurisdiction. As to numerous other such projects, the Commission has expressly disclaimed jurisdiction (see cases cited note 7, *infra*). As to yet others, the owners have never sought a Commission determination as to jurisdiction, relying on the now-settled doctrine that the Commission's jurisdiction does not reach their projects.

In this case, the court of appeals affirmed FERC's announcement that it possesses the power under section 4(e) of the Act, 16 U.S.C. § 797(e), to grant licenses voluntarily sought, though not required by section 23(b). As the Commission put it, Clifton "may seek, but is not required to obtain, a license for its * * * project." App. 69a. Neither FERC nor its predecessor had identified section 4(e) as a substantive basis for licensing juris-

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[1] According to one FERC Commissioner, FERC staff has identified "at least 500" non-federal, unlicensed constructed hydroelectric projects. Fairfax County Water Auth., 43 F.E.R.C. ¶ 61,062 at p. 61,170 (1988) (Trabandt, Comm'r, dissenting in part).

diction in the half-century since the subsection was enacted.

In practical effect, the decisions below plunge the owners of these projects into a regulatory no-man's land, in which the question whether a license is (or will ultimately be) required will remain profoundly unsettled. To the extent that the owners of these projects seek to protect their property by "volunteering" for licenses, the court of appeals' decision conflicts with the decisions of the Second Circuit in *Farmington* and the Ninth Circuit in *Puget Sound*, which held that such projects are beyond the Commission's reach. The court of appeals' affirmance promotes uncertainty, if not chaos, in the scheme of regulation authorized by Congress by erasing the established lines between projects subject to FERC's jurisdiction, and those beyond its purview. To achieve that result, the court of appeals ignored the plain meaning of the Act, and overlooked the Commission's own long-standing interpretation of its licensing authority under the Federal Power Act. The Court should grant the petition for a writ of certiorari to resolve the uncertainties created by the court of appeals' decision, and to delimit the Commission's exercise of its jurisdiction to the authority conferred by the Federal Power Act.

A. The Court of Appeals' Decision Creates Serious Uncertainties in the Regulatory Scheme Established by Congress, and Approves FERC's Extraordinary Reach for New Theories of Licensing Jurisdiction.

1. The Commission's unprecedented reading of its authority under section 4(e) places at risk the very class of projects held by the courts of appeals in *Farmington* and *Puget Sound* to be beyond the Commission's licensing jurisdiction. Under FERC's rationale, it may grant a license under section 4(e) to anyone who volunteers for a license. A "volunteer applicant" need not be a project owner. Section 21 of the Act, 16 U.S.C. § 814, confers

the federal power of eminent domain on FERC licensees, and the Commission has, for that reason, held that property ownership is not pertinent to its administration of Part I of the Act. *E.g., Michael Earl Springer*, 24 F.E.R.C. ¶ 61,027 (1983); *Suncook Power Corp.*, 22 F.E.R.C. ¶ 61,230 (1983); *Jack M. Fuls*, 18 F.E.R.C. ¶ 61,065 (1982).

The anomalous effect of the court of appeals' decision is that the owners of projects constructed prior to 1935 on nonnavigable waters, including the very owners of the projects held to be beyond the Commission's reach in *Farmington* and *Puget Sound*, may find their projects to be the targets of license applications by strangers. The only recourse for such owners will be for themselves to file license applications, and that is precisely the result that the Commission anticipates. Expressing its intention, in cases in which non-owners file license applications for *Farmington*-type projects, to give notice to the owner, FERC stated on rehearing (App. 41a):

> This provides additional assurance that an owner of an unlicensed operating project, that perhaps was thought not to require licensing, will have notice in the event that someone else applies for a license for the project. Thus, the owner will have the opportunity to take whatever action the owner may deem appropriate, including the filing of a competing application.

The Commission's theory of licensing jurisdiction under section 4(e), if sustained, will require the owners of projects for which no license is necessary to seek licenses for those very projects. This paradoxical result, which conflicts with the holdings in *Farmington* and *Puget Sound*, can only be avoided by reading section 4(e) as authorizing FERC to issue licenses where section 23(b) of the Act gives it judisdiction to do so.

The proposition that the owners of projects constructed prior to 1935 on nonnavigable waters are subject to

license applications by non-owner volunteers has proven neither hypothetical nor speculative. In *Orange and Rockland Utils., Inc.*, 40 F.E.R.C. ¶ 61,222 (1987), the Commission, explicitly relying on the interpretation of section 4(e) offered in this proceeding, denied a motion by a public utility to dismiss license applications filed by an outsider for two projects in the *Farmington* class. The Commission had earlier determined that it lacked jurisdiction over those projects, because the owner had constructed them prior to 1935 on nonnavigable waters. *Orange and Rockland Utils., Inc.*, 39 F.E.R.C. ¶ 62,028 (1987). The message, therefore, conveyed by the court of appeals' approval of the Commission's jurisdictional theory is that project owners should seek licenses even if the Commission lacks jurisdiction over the project under section 23(b), lest continued ownership and operation of the project be terminated by a volunteer applicant.[2]

2. FERC's orders in this case reflect its current initiative to expand its jurisdiction over hydroelectric projects in general, and, specifically, to overcome precedents that it perceives as impediments to regulation. Having been rebuffed in its attempts to assert jurisdiction over the

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[2] The Commission, with the court of appeals' endorsement, offered the reassurance to unlicensed project owners that it "will not necessarily" apply a regulation (18 C.F.R. § 4.37) favoring the first applicant to file, where a non-owner files the first license application. App. 41a. Whatever may be the case with private applicants, FERC's offer utterly ignores the statutory preference for municipal applicants of section 7(a) of the Act, 16 U.S.C. § 800(a), which the Commission may not waive. In another context, the licensing preference for "municipalities," *see* 16 U.S.C. § 796(7), so threatened to alter the ownership structure of hydroelectric projects that Congress, after major legal battles, resolved the matter by legislation. *See generally* Electric Consumers Protection Act of 1985, H.R. REP. No. 99-507, 99th Cong., 2d Sess. (1986); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987), (*en banc*), *cert. denied*, 484 U.S. —— (1988); Alabama Power Co. v. FERC, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983).

Farmington and Electron (*Puget Sound*) projects, for example, FERC has now discovered a different basis on which to subject those projects to licensing. Indeed, in *Aquenergy Systems, Inc.*, 39 F.E.R.C. ¶ 61,178, *appeal docketed*, No. 87-3853 (4th Cir. 1987), the Commission has attempted to retrench on the reconstruction principle enunciated in the *Puget Sound* decision, by holding that the mere passage of time prior to the restoration to service of a project constructed prior to 1935 on nonnavigable waters will require a license for that restoration.

Dissenting in part to the majority's decision in *Fairfax County Water Auth.*, 43 F.E.R.C. ¶ 61,062 (1988), a FERC Commissioner recently objected to an ongoing Commission program to investigate, with the purpose of asserting jurisdiction over, 500 currently unlicensed projects:

> It is not clear at the outset that the relative cost versus benefit analysis of applying such full blown federal licensing requirements to at least 500 existing projects would support a decision to implement the proposed program, apart from the arguable legal technicality as to whether a particular existing project might *today* be considered jurisdictional under the *currently* applicable precedents for determining jurisdiction (several of which post date the original construction of many of the existing projects to which they would now be applied after the fact). * * * I am not persuaded that there is the established need today to seek out every unlicensed existing project across the country that arguably could be deemed to be jurisdictional under one or another of the applicable legal theories, to render the affirmative jurisdictional determination and require licensing, and then to proceed through the full blown federal licensing process with application of all possible requirements.

Id. at p. 61,172 (emphasis in the original).

FERC may believe that it should have more authority over hydroelectric projects, and, as reflected elsewhere in the *Fairfax* dissent, FERC may believe that more regulation is appropriate. The limits over FERC's jurisdiction, however, are established not by its perception of the public good, but by statute. As this Court stated in *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986): "The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer." Unless the Federal Power Act clearly authorizes the assertion of jurisdiction by the Commission, no court should grant it unbridled discretion to assert such jurisdiction.

B. FERC Developed, and the Court of Appeals Approved, a New Theory of Jurisdiction Only By Contradicting the Plain Meaning of the Statute, Misapprehending the Purpose of Relevant Amendments to the Act, and Ignoring the Commission's Longstanding Interpretation of the Statute.

1. Section 4(e) confers broad authority, empowering FERC to issue licenses for projects "across, along, from or in" Commerce Clause waters. App. 81a. So broad is section 4(e), that were it the substantive basis for FERC jurisdiction over hydroelectric projects, then this Court would not have found it necessary to wrestle with the often subtle questions regarding the Commission's jurisdiction. *See, e.g., Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975) (Commission lacks jurisdiction over fossil-fired generating stations on Commerce Clause waters); *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965) (Commission has jurisdiction over pumped-storage hydroelectric projects on Commerce Clause waters).

If section 4(e) confers jurisdiction over Clifton's project, then, logically, it should also confer licensing jurisdiction over all other projects constructed prior to 1935 on nonnavigable waters. *Farmington* and *Puget Sound*,

however, hold that the Commission lacks jurisdiction over such projects. The Commission's solution to this problem was to posit a qualification to its authority under section 4(e), under which it may grant a license under that subsection "on voluntary application". App. 33a. Thus, the court of appeals and FERC propose a dual scheme of licensing for pre-1935 projects on nonnavigable waters: while the Commission may not require a license for an unwilling project owner, it may award a license for the same project so long as someone—anyone—volunteers for a license. That qualification, however, nowhere appears in section 4(e) itself,[3] and no evidence appears on the face of the statute that Congress intended such an optional scheme of licensing jurisdiction for this class of projects.

To the contrary, Congress established precisely such an optional scheme for another class of projects. When Congress enacted the Federal Water Power Act in 1920, it exempted from licensing any project authorized by a then-existing "permit or valid existing right-of-way." Federal Power Act section 23(a), 16 U.S.C. § 816; *see generally Washington Water Power Co. v. FERC*, 775 F.2d 305 (D.C. Cir. 1985). Congress explicitly provided, however, that the owners of such projects could volunteer for a license:

> [A]ny person * * * holding or possessing such permit, right-of-way, or authority may apply for a

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[3] FERC's reading of section 4(e) requires the addition of words to the statute:

> Section 4. The Commission is authorized and empowered—
>
> (e) To issue licenses [*to voluntary applicants, but not to unwilling owners,*] * * * for the purpose of constructing, operating, and maintaining dams, water conduits, [etc.]

An agency interpretation that "depends upon the addition of words to a statutory provision which is complete as it stands" should be rejected. Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 107 S. Ct. 1855, 1861 (1987).

> license hereunder and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part * * *.

Congress' deliberate adoption of a voluntary, optional licensing scheme in 1920 shows that when it wanted to offer otherwise exempt projects a licensing option, it knew how to do so.[4] Congress' election 15 years later, when it added section 4(e) to the Act, not to provide such an option for projects such as Clifton's provides compelling evidence both that Congress intended no such option, and that the court of appeals and the Commission err in reading such an option into section 4(e).[5] *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 381 (1987) (Congress' deliberate use of language in one context relevant to interpretation of another context in which Congress did not employ such language).

2. In affirming FERC's interpretation of section 4(e) as authorizing issuance of licenses to voluntary applicants, the court of appeals fundamentally misconceived the structure of the Federal Power Act prior to the 1935 amendments. Stated the court: "Under the pre-1935 version of § 23(b), licenses were required only where the applicant voluntarily declared his intention to construct a project, thereby submitting himself to Commission jurisdiction. * * * In this sense, the precursors to §§ 23(b) and 4(e) were similar in their voluntary orienta-

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[4] The Commission's expansive reading of its authority under section 4(e) suggests that even those projects with pre-1920 permits, rights-of-way, or other authorities may be jeopardized. No apparent impediment appears to preclude the filing of a license application for such a project by a non-owner, or the Commission's granting a license for the project under its new section 4(e) theory.

[5] In 1935, Congress reenacted section 23(a) in enacting the 1920 legislation as Part I of the Federal Power Act. *Chemehuevi*, 420 U.S. at 403.

tion." App. 8a-9a. Not so. The option for prospective developers of projects on nonnavigable waters prior to 1935 was not a licensing option, but an optional declaration of intention. The prospective developer could ignore the Commission entirely, and build a project on nonnavigable waters pursuant to state law. Alternatively, the prospective developer could file a declaration of its intent with the Commission. This was not, as the court of appeals held, a voluntary submission to Commission jurisdiction; upon the filing of a declaration of intention, the Commission investigated the proposed project, and required a license only if the interests of commerce were sufficiently affected. In fact, the Commission responded to numerous declarations of intention filed between 1920 and 1935 by concluding that the project would not significantly affect commerce, thereby relieving the developer from any obligation to secure a license for the project.[6] These projects, too, are now, despite the passage of up to 68 years, subject to licensing under the Commission's new, expansive reading of its authority under section 4(e).

3. FERC's decision in this case also conflicts with its long-standing approach to its authority under section 4(e). The Commission acknowledged that it had never, before now, attempted to rely on section 4(e) as an independent basis for licensing. App. 38a-39a. To the contrary, in cases identical to this in which the owners of projects constructed prior to 1935 on nonnavigable waters had actively volunteered for a license, the Com-

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[6] *E.g.*, FEDERAL POWER COMMISSION, FIFTEENTH ANN. REP. 11 (1935) (finding no license required in response to a declaration of intention); FPC, ELEVENTH ANN. REP. 39 (1931) (same finding, one project); FPC, TENTH ANN. REP. 38 (1930) (one project); FPC, EIGHTH ANN. REP. 42 (1928) (four projects); FPC, SIXTH ANN. REP. 33 (1926) (one project); FPC, FIFTH ANN. REP. 26 (1925) (11 projects); FPC, FOURTH ANN. REP. 36 (1924) (five projects); FPC, THIRD ANN. REP. 24-25 (1923) (eight projects); FPC, FIRST ANN. REP. 28 (1921) (eight projects).

mission has consistently dismissed the license applications without once adverting to its newfound section 4(e) theory.[7] These projects are also now subjected to the threat of licensing.

The court of appeals' flippant reaction to these cases does little to reassure the owners of such projects, who have secured FERC determinations that their projects are not subject to licensing:

> Assuredly, the Commission does not even now explicate why it decided to rouse this dormant authority so late in the day. * * * If Congress has in fact vested the FERC with certain authority, the Commission may play the Prince Charming to its statutory Sleeping Beauty, and presumably live with her happily ever after.

App. 12a-13a.

The court of appeals' holding directly conflicts with this Court's admonitions that little deference is due an agency's statutory interpretation where that interpretation is far from contemporaneous, *General Elec. Co. v.*

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[7] *E.g.*, "Order Finding No Jurisdiction and Dismissing Application for License," Hotel Baker, 18 F.E.R.C. ¶ 62,035 (1982); "Order Dismissing Application for Major License," Niagara Mohawk Power Corp., 12 F.E.R.C. ¶ 62,106 (1980); "Order Dismissing Application for License," Town of Lake Lure, 11 F.E.R.C. ¶ 62,262 (1980); "Order Dismissing Application for Minor License," Pepperell Paper Co., 11 F.E.R.C. ¶ 62,209 (1980); "Order Dismissing Application for Major License," Niagara Mohawk Power Corp., 11 F.E.R.C. ¶ 62,061 (1980); "Order Finding Licensing Not Required," Pacific Gas and Electric Co., 9 F.E.R.C. ¶ 62,185 (1979); "Order Dismissing Application for Minor License," Village of Springville, 9 F.E.R.C. ¶ 62,132 (1979); "Order Dismissing Application for License," Duke Power Co., 9 F.E.R.C. ¶ 62,037 (1979); "Order Dismissing Application for Minor License," Connecticut Light and Power Co., 8 F.E.R.C. ¶ 62,076 (1979); "Order Dismissing Application for Minor License," Green Mountain Power Corp., 7 F.E.R.C. ¶ 61,186 (1979); "Order Dismissing Application for License," Western Massachusetts Elec. Co., 7 F.E.R.C. ¶ 61,126 (1979).

Gilbert, 429 U.S. 125, 142 (1976), far from long-standing, *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3254 (1986), and far from consistent, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

4. At bottom, the underpinning of the decisions of the court of appeals and FERC appears to be that federal regulation of projects currently exempt from licensing is a good thing. As the court of appeals commented:

> [I]t is unreasonable to assume that Congress clandestinely prohibited licensing of an entire category of unlicensed projects, contrary to its clear goal of expanding federal regulation. Indeed, the limiting construction of § 4(e) espoused by Cooley would undermine substantially Congress' avowed desire for comprehensive federal regulation of hydropower projects by forbidding the licensing of all projects constructed prior to 1935 no matter how great their effects on interstate commerce or the desires of their owners or operators to come within the federal regulatory laws.

App. 9a-10a (footnote omitted). With all respect to the court of appeals, Congress deliberately chose to exclude from regulation the entire class of projects constructed prior to 1935 on nonnavigable waters. *Farmington; Puget Sound.* It is the function neither of the court of appeals nor FERC to attempt to resurrect licensing jurisdiction over these projects. As this Court has observed, regulatory ends do not justify regulatory means in the absence of legislative authorization:

> [T]he desirability of uniform federal regulation is abundantly clear. Nevertheless, * * * a *need* for federal regulation does not establish FPC jurisdiction that Congress has not granted.

FPC v. Louisiana Power & Light Co., 406 U.S. 621, 634-36 (1972) (emphasis the Court's).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 9, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1249

MARJORIE LINDER COOLEY,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

Petition for Review of Orders of the
Federal Energy Regulatory Commission

Argued March 1, 1988

Decided April 12, 1988

McNeill Watkins, II, with whom *Steven J. Riggs* were on the brief, for petitioner.

Hanford O'Hara, Attorney, Federal Energy Regulatory Commission, with whom *Catherine C. Cook*, General Counsel and *Jerome M. Feit*, Solicitor, Federal Energy Regulatory Commission, were on the brief, for respondent. *Joseph S. Davies*, Attorney, Federal Energy Regulatory Commission also entered an appearance for respondent.

Michael N. McCarthy was on the brief, for intervenor Clifton Power Corporation.

Before: WALD, Chief Judge, EDWARDS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: This is an appeal from a grant by the Federal Energy Regulatory Commission (FERC or the Commission) of a license to Clifton Power Corporation (Clifton) for the operation of a small hydroelectric plant on the Pacolet River, in Spartanburg County, South Carolina. The license is challenged by Marjorie Linder Cooley, the owner of a one-half acre strip of riprarian land flooded by the project.

The principal issue in the case is whether the Commission may grant licenses under § 4(e) of the Federal Power Act (FPA or the Act), 16 U.S.C. § 797(e), to voluntary applicants to operate hydroelectric plants constructed prior to 1935 on certain nonnavigable streams, despite its inability to require such licenses under § 23(b) of the Act, 16 U.S.C. § 817. *See Farmington River Power Co.* v. *FPC*, 455 F.2d 86 (2d Cir. 1972). We affirm the Commission's authority under § 4(e) to grant such licenses. We also reject Cooley's contention that the Commission committed numerous errors in determining that Clifton was a "fit" licensee. Despite some concerns about the Commission's handling of this case, we find its licensing decision neither arbitrary nor capricious.

I. BACKGROUND

In May, 1981, Clifton applied for a license from the FERC to operate an idle hydroelectric plant on the Pacolet River. Joint Appendix (J.A.) at 1-37. In July, Clifton began operating the project without a license and selling its electricity to Duke Power Company. Cooley then intervened in the license proceeding, claiming that Clifton's project had flooded 16.4 acres of her land[1] and

[1] According to the Fourth Circuit, the increase in water level caused the flooding of approximately one-half acre of land along

that Clifton had refused to negotiate a lease with her. J.A. at 38.

The Commission, in November, 1983, issued an order to show cause why Clifton should not stop operating its plant without the license apparently required by § 23(b).[2] J.A. at 175. In response, Clifton claimed, contrary to statements in its initial application, that both of the plant's generators had been installed prior to 1935. If true, this fact would put the project outside the scope of § 23(b)'s requirements.[3]

Cooley's riverfront but within the natural banks of the river. The strip extended about 1,700 feet in length and its width ranged from two to thirty feet. Cooley v. Clifton Power Corp., 747 F.2d 258, 259 (4th Cir. 1984).

[2] The commission believed that such a license was required because Clifton's initial application indicated that one of the project's two generators had been installed in 1937. J.A. at 5. If this information had been accurate, Clifton might have been subject to the Act's licensing requirement under § 23(b) as a post-1935 project on a nonnavigable stream affecting interstate commerce.

[3] Section 23(b) states that:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with thhe terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed

In June, 1985, the Commission terminated the show cause proceeding because of the substantial possibility that it did not have § 23(b) jurisdiction to require a license.[4] The FERC transferred the record of the show cause proceeding to the pending license proceeding.[5]

Following a brief, unsuccessful attempt to obtain relief in South Carolina state court, Cooley supplemented her barrage of motions before the Commission with an action in federal district court seeking damages and injunctive

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construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. . . .

16 U.S.C. § 817. Section (4)(e) authorizes the Commission:

> . . . (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States . . . .

16 U.S.C. § 797(e).

[4] Ambiguities cast doubt on the Commission's jurisdiction; there was a discrepancy in Clifton's submissions regarding whether the generators were constructed before or after 1935 and there remained the unresolved factual issue of whether the Pacolet was a "navigable water." (Under § 23(b), licenses are required for projects on "navigable" waters and those on nonnavigable waters that affect interstate commerce. 16 U.S.C. § 817.)

[5] Cooley sought a rehearing of this order. The Commission, however, denied this request and she sought no further review.

relief for the flooding of her land. After an initial adverse ruling by the trial court, the Fourth Circuit held that Clifton had violated South Carolina statutory and common law by causing the water level of the Pacolet to rise six feet at Cooley's lower property line. *Cooley* v. *Clifton Power Corp.*, 747 F.2d 258 (4th Cir. 1984). On remand, the district court awarded damages of $89.50 for the three-year rental value of that flooded land and an injunction requiring Clifton to maintain its reservoir at a level below the elevation of Cooley's land. Because of operational difficulties,[6] Clifton was unable to keep the water level below 588.3 feet above mean sea level, thereby violating the court's order. J.A. at 233-34. In an enforcement proceeding, the district court ordered Clifton to either pay a $5,000 fine or monitor the elevation with whatever device or personnel was necessary to ensure compliance. As a result, Clifton installed monitoring equipment.

In the ongoing FERC license proceeding, Cooley suggested that the Commission dismiss Clifton's application for lack of jurisdiction and, in the alternative, requested an evidentiary hearing on several matters regarding Clifton's fitness as a licensee.[7] J.A. at 50-63. The FERC nonetheless issued the license, finding that it possessed

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[6] The Commission found that the violations occurred "not because of some purposeful intent to circumvent the court's order, but because of difficulties [Clifton] had in adequately matching its operation to the varying inflow to its project . . . ." J.A. at 168. The variation in inflow was caused by the irregular operation of another plant upstream from Clifton Mills Project No. 1.

[7] Cooley filed another complaint against Clifton charging that it had failed properly to qualify its facility under § 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2601, and the Commission's regulations thereunder. *See* 18 C.F.R. §§ 292.601, 292.602 (1987). However, in response to the complaint, Clifton filed the proper notice and the Commission dismissed the complaint. *See* Cooley v. Clifton Power Corp., 34 F.E.R.C. ¶ 61,151 (1986).

the power under § 4(e) to grant licenses voluntarily sought, though not required under § 23(b); Clifton "may seek, but is not required to obtain, a license for its . . . project." J.A. at 67. The Commission also summarily rejected Cooley's several concerns about Clifton's fitness to be a licensee.

Cooley requested a rehearing on a number of grounds. She argued that § 4(e) of the Act does not confer any independent licensing authority on the Commission over and above § 23(b)'s requirements and also that the FERC erred in issuing the license without adequately addressing Clifton's fitness. As an example, she pointed to its refusal to give sufficient weight to Clifton's repeated violations of South Carolina law regarding river banks and beds. *See* 16 U.S.C. § 802(a)(2) (Supp. 1986) (requiring license applicants to submit satisfactory evidence of compliance with state law).

Seven months after filing her rehearing request, Cooley submitted additional information alleging that Clifton had failed to meet a number of financial obligations; Clifton had defaulted on a loan agreement and failed to pay both federal and county taxes, and Spartanburg County had issued a tax execution and sold the property. J.A. at 125-38.[8]

On May 5, 1987, after examining both her jurisdictional and fitness arguments, the Commission denied Cooley's petition for rehearing. The Commission refused to consider her final post-hearing submission on the technical ground that it constituted a new request for rehearing filed outside the 30-day statute of limitations. *See* 16 U.S.C. § 825*l*(a).

Before this court, Cooley seeks review of the Commission's orders granting the license to Clifton and denying

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[8] At oral argument, counsel for the FERC informed the court that Clifton still owns and operate the project.

her rehearing request. She reasserts her claim that § 4(e) does not give the FERC jurisdiction over voluntary license applicants and raises an amalgam of arguments why, even if the Commission does not have the *power* to issue a license, Clifton should be considered unfit to receive one.

II. Section 4(e) Jurisdiction

Cooley argues that the Commission does not have authority under § 4(e) to grant a license voluntarily sought by the operator of a project constructed prior to 1935 on nonnavigable waters. According to her interpretation, the FERC's jurisdiction under § 4(e) is coterminous with that under § 23(b).

Cooley relies on decisions holding that the Commission may not *require* licenses for projects built entirely before 1935 for the quite different proposition that the Commission may not *grant* licenses voluntarily sought for projects of such advanced age. *See Farmington River Power Co.* v. *FPC*, 455 F.2d 86 (2d Cir. 1972);[9] *see also Puget Sound Power & Light Co.* v. *FPC*, 557 F.2d 1311 (9th Cir. 1977) (no license required even when generators destroyed in 1936 are replaced). These cases, however, do not address the question of first impression raised here; whether § 4(e) gives the Commission authority to grant licenses that it may not require under § 23(b).

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[9] The *Farmington* court apparently assumed that Congress did in fact grant the Commission the power to grant, but not require, licenses in these situations. The court rejected the identity between the authority to grant and to require, stating that:

> It is tantamount to the assertion that because *Congress gave the Commission jurisdiction to issue licenses on voluntary application* by the one undertaking such a project on a nonnavigable stream, it also gave the Commission the power to make such licenses mandatory.

Farmington, 455 F.2d at 89 (emphasis added; footnote omitted).

The plain language of the two sections does not support Cooley's interpretation. *See supra* note 3. Section 23(b) *requires* licenses for any person "intending to construct" a project on nonnavigable waters over which Congress has Commerce Clause jurisdiction. 16 U.S.C. § 817. The language "intending to construct" has been consistently held to limit the scope of § 23(b)'s license requirement to post-1935 construction. *Farmington*, 455 F.2d 86 (2d Cir. 1972). No similar language appears in § 4(e). Section 4(e) states only that the FERC is "authorized and empowered" to issue licenses for any projects "across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction" under the Commerce Clause, irrespective of the date of construction. Thus, its plain language gives no indication that Congress intended to limit the Commission's power to grant licenses, as opposed to its § 23(b) authority to require them, to post-1935 projects.

The legislative history of the 1935 Act buttresses the plain language of the statute; there is nothing in that history suggesting that Congress meant to confine the Commission's power under § 4(e) to the contours of § 23(b). Under the pre-1935 version of § 23(b),[10] li-

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[10] Section 23(b) in the 1935 Act, *see supra* note 3, replaced the second paragraph of § 23 in the 1920 Act:

> That any person, association, corporation, State or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, *may in their discretion file declaration of such intention* with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if *upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such construction*, such person, association, corporation, State, or municipality shall not proceed with such construction until *it shall*

censes were required only where the applicant voluntarily declared his intention to construct a project, thereby submitting himself to Commission jurisdiction. (Otherwise, a potential hydroelectric plant operator need do no more than meet the requirements of state law.) While § 23 outlined the procedures to be followed by voluntary applicants, the predecessor to § 4(e) empowered the Commission to issue licenses to them. In this sense, the precursors to §§ 23(b) and 4(e) were similar in their voluntary orientation.

The 1935 amendment adding § 23(b) made licensing a mandatory requirement for all new projects. The purely voluntary scheme had proved inadequate for the development of a comprehensive system of water power regulation. *See* S. Rep. No. 621, 74th Cong., 1st Sess. (1935); *see also First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 180 (1946) (1935 Act designed to establish "complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation"). There is no indication, however, that by so amending § 23 Congress intended to remove the Commission's existing parallel authority to grant licenses under § 4 for those pre-1935 projects whose operators might yet decide to seek them. Absent any clear sign of such intent, it is unreasonable to assume that Congress clandestinely prohibited licensing of an entire category of unlicensed projects, contrary to its clear goal of expanding feedral regulation.[11] Indeed, the limiting

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have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Federal Water Power Act, Pub. L. No. 66-280, § 23, 41 Stat. 1063, 1075 (1920) (emphasis added).

[11] The Commission itself proposed the 1935 amendments. One would not normally expect an agency to tacitly cut back on its existing powers.

construction of § 4(e) espoused by Cooley would undermine substantially Congress' avowed desire for comprehensive federal regulation of hydropower projects by forbidding the licensing of all projects constructed prior to 1935 no matter how great their effects on interstate commerce or the desires of their owners or operators to come within the federal regulatory laws.

Supportive of the Commission's interpretation is the fact that § 4(e) itself was amended in 1935 to broaden its application; Congress removed the apparent limitation on the Commission's power to license projects on "navigable waters," replacing it with language granting authority over any waters subject to Congress' Commerce Clause jurisdiction.[12] The Commission's Solicitor and the principal architect of the 1935 amendments, Dozier DeVane, explained that the purpose of the § 4(e) amendment was simply to clarify that the Commission's existing authority to issue licenses, which until then had been limited by § 23 to voluntary applicants for projects on navigable waters, would thereafter extend to those projects on Commerce Clause waters required to be licensed under the new § 23(b):

> All we propose by the amendment to section 4, is to write into the section the implied power which we think the Commission now has to issue licenses in cases arising under section 23 of the Act.

Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 470 (1935). The amendment in effect reaffirmed under

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[12] Under the old § 23, the Commission had licensing authority over nonnavigable waters projects affecting interstate commerce. Section 4(d), the predecessor of § 4(e), created some ambiguity, however, because it purported to grant the Commission licensing authority only over projects on navigable waters. *See* Federal Water Power Act, Pub. L. No. 66-280, § 4, 41 Stat. 1063, 1065 (1920).

§ 4(e) the authority the Commission already possessed to issue voluntary licenses.[13]

Thus, although the new § 23(b) gives the Commission power to require licenses for post-1935 projects, nothing in that amendment removes the authority to issue licenses to volunteers, which it formerly exercised under the old §§ 23 and 4(d). The new § 4(e) now became the repository of the Commission's "general grant of power" to issue licenses, both required and voluntary. S. Rep. No. 621, 74th Cong., 1st Sess. 43 (1935). No one suggested during the Act's passage that this "general grant of power" was meant to exclude the Commission's prior power to issue pre-1935 voluntary licenses, and the breadth of § 4(e)'s language certainly includes such power.

Just as the amendment of § 4(e) in 1935 "added nothing" to the Act, *see supra* note 13, neither did it subtract anything. There is no basis for concluding, as Cooley does, that it destroyed the Commission's then-unquestioned authority to issue licenses on a voluntary basis for projects already construed on nonnavigable waters where the operation of such a plant affected interstate commerce and the license was found to be in the public interest. The Commission reasonably refuses to read the explicit limitation of § 23(b)'s "intending to" (post-1935) language into § 4(e), which contains none such.

Cooley argues, however, that an express voluntary license provision in § 23(a), reenacted in 1935, demonstrates that Congress would have used similar language in amending § 4(e) if it intended the Commission to have such authority. 16 U.S.C. § 816.[14] However, § 23(a)'s

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[13] Under questioning, Solicitor DeVane expressly stated, "I do not see that the amendment [to § 4(e)] that we proposed adds anything to the Act." *Id.* at 469.

[14] Section 23(a) provides that the Act shall not affect pre-existing valid permits. It also provides that any person holding a permit

express provision for voluntary licensing was deemed necessary in the 1920 Act to clarify the Commission's authority to grant new licenses at all to existing holders of valid permits or rights of way, in view of the Act's emphasis on preserving all such pre-1920 rights. The primary thrust of § 23(a) was to preserve those rights vested prior to 1920:

> The provisions of this subchapter shall not be construed as affecting any permit or valid existing right of way granted prior to June 10, 1920 . . . .

Id. Congress therefore explicitly authorized the Commission to issue new licenses and void prior permits where the operators of previously authorized pre-1920 projects chose to waive vested rights in return for a new Commission license. Previously unlicensed 1920-1935 projects, on the other hand, hold no similar permits or rights that would require explicit authorization to override them.

Cooley also claims that the Commission has departed from its own longstanding interpretation of § 4(e), and so is entitled to little deference for its new one. The FERC answers that while there is no prior "articulated Commission precedent" on its § 4(e) voluntary licensing authority, the mere absence of such precedent is not the same as a prior inconsistent interpretation. Respondent's Brief at 25, *citing* J.A. at 153. None of the decisions denying license applications to pre-1935 projects squarely address the Commission's power to grant voluntary licenses under § 4(e) and many do not involve truly voluntary applications. Assuredly, the Commission does not even now explicate why it decided to rouse this dormant authority so late in the day. Nonetheless, even a prolonged failure to assert an agency power does not destroy

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may apply for a new license under the Act and that "upon such application the Commission may issue to any such applicant a license." *Id.*

it. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-48 (1956). If Congress has in fact vested the FERC with certain authority, the Commission may play the Prince Charming to its statutory Sleeping Beauty, and presumably live with her happily ever after.

Finally, acording to Cooley, the power claimed under the Commission's new reading of § 4(e) puts pre-1935 project owners at risk because volunteer applicants need not be project owners. Thus, the owner of a project not requiring a license may find himself the target of a license application by strangers. Of course, even if true, nothing prevents the current owner-operator from opposing such an application or filing a competing application;[15] the Commission must still address all such applications in terms of its public interest standard.[16] Finally, despite a similar theoretical threat to pre-1935 project owner-operators from nonowner applicants proposing improvements involving new construction, there is no cited evidence of massive abuses; before the Commission claimed § 4(e) voluntary license authority, an aggressive stranger could threaten an unlicensed owner-operator by applying for a license under § 23(b) involving post-1935 construction improvements. Indeed, one would suppose that such an applicant proposing beneficial modifications

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[15] The Commission has also agreed to waive its normal first-in-time rules, 18 C.F.R. § 4.37 (1987), in cases in which non-owner applicants seek licenses before the owners themselves apply. J.A. at 155.

[16] This is, therefore, not a case in which the Commission is doing indirectly something which it cannot do directly. No license may be granted if it is not in the public interest to do so. Moreover, it is not the Commission which creates pressure on an owner-operator to file its own application or resist that of another, but rather the competing applicant. For example, in Orange Rockland Utilities, Inc., 40 F.E.R.C. ¶ 61,222 (1987), the Commission relied on its *Clifton* interpretation of § 4(e) to deny a motion to dismiss competing license applications for two projects, and it will now determine on the merits which potential licensee will best serve the public interest.

would stand a better chance of getting a license than would Cooley's hypothetical interloper who does not propose any substantial improvements, but merely seeks the FERC's aid in wresting control of a plant from the current operator. Thus, the Commission's interpretation in this case does not create a new or irreconcilable conflict in FERC's regulatory structure.

In sum, nothing in the statute's language, history, structure, or purpose gives any indication that Congress intended to limit the FERC's existing jurisdiction to grant licenses voluntarily when it amended the Act in 1935. Under these circumstances, we conclude that the Commission's interpretation of its authority under § 4(e) to grant voluntary licenses for pre-1935 projects on nonnavigable streams over which Congress has Commerce Clause jurisdiction is a reasonable one, not contrary to any discernible congressional intent. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (reasonable agency interpretation of ambiguous statutory provision must ordinarily be honored).

III. Fitness

Cooley's "fitness" arguments must be viewed in context. Nothing in the Act explicitly requires a finding of fitness. Rather, the statute lays out general public interest criteria for licensing; the Commission, in its discretion, determines whether a project is:

> . . . best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for beneficial public uses, including recreational purposes.

16 U.S.C. § 803(a). The Commission is charged with considering all of the relevant factors under this provi-

sion. *Udall* v. *FPC*, 387 U.S. 428, 450 (1967). The general fitness of the licensee-applicant is one of these factors, *see Delaware River Development Corp.*, 10 F.P.C. 540, 550 (1951) ("ethical and moral fitness" considered in public interest determination to grant permit), although, so far as we can tell, no decision in the FERC's history has ever denied a license solely on grounds of moral or ethical unfitness. In this case, despite several admitted shortcomings in Clifton's conduct, the Commission did not abuse its discretion in granting the license.

The first of Cooley's arguments is that the Commission erred in issuing a license because Clifton had violated relevant state law. The Act, however, while requiring an applicant to submit information about compliance with state law respecting river beds and banks, does not mandate absolute compliance with such law as a prerequisite to licensing, but instead directs the Commission to gather relevant information to employ in the exercise of its discretion. *Public Utility Dist. No. 1 of Pend Oreille County* v. *FPC*, 308 F.2d 318 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963). *See also First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 167 (1946) ("authority expressly given . . . to require . . . the presentation of evidence satisfactory to it of the petitioner's compliance with any [state] requirements . . . that the Commission considers appropriate to effect the purpose of a federal license"). The Commission, while taking account of Clifton's violations of state law, adequately explains why they are not sufficient grounds for denying a license; they were unintentional.

The Commission found that Clifton's violations of the district court's explicit water-level injunction were inadvertent,[17] the result of operational difficulties; an up-

[17] Clifton claims to have believed initially that South Carolina law did not prohibit raising the water level so long as it remained below the natural banks of the river and to have been willing to negotiate a lease with Cooley, but the Commission did not rely on either of these factors.

stream dam operator erratically released large volumes of water, which Clifton could not accommodate.[18] J.A. at 168. Given the Commission's recognition that Clifton's violation of state law resulted from good-faith errors, the FERC properly concluded it does not demonstrate moral or ethical unfitness. Furthermore, Clifton's past violations of state law are also peripheral to the issue of Clifton's fitness to operate the dam in the future because the license will give Clifton the ability to acquire the disputed rights to Cooley's affected land through the exercise of eminent domain.

Cooley also points to the Commission's statement that "there appears to be an inference of willingness [on Clifton's part] to disregard the requirements of the FPA, particularly 23(b)" as evidence of ethical unfitness. J.A. at 169. This remark was directed at Clifton's commencement of operations immediately after filing a license application although the facts it stated therein, if true, would have subjected it to § 23(b)'s license requirement.[19] By the time the Commission granted the license, however, it seemed unlikely that there had been an actual violation of § 23(b) because, as Cooley now apparently concedes, both of the project's generators appear to have been installed prior to 1935. At any rate, the Commission concluded that no violation of § 23(b) had been established. J.A. at 169. Even if § 23(b) were applicable, the Commission still could have granted the license; the FERC may impose remedies other than license denial

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[18] Clifton also eventually installed monitoring equipment to meet the requirements of the injunction despite the heavy, variable water flow.

[19] Similarly, Clifton's failure to file a notice of qualifying status might also lend some support to an inference of willingness to disregard the PURPRA. *See supra* note 7. But Clifton immediately corrected this oversight in response to Cooley's complaint. Therefore the Commission was within its discretion in finding this an insufficient ground for a finding of unfitness.

for violations of § 23(b). J.A. at 169 n.47. Indeed, a common remedy in such cases is to back-date the license and assess annual charges retroactively. *See, e.g., Idaho Power Co.*, 7 F.E.R.C. ¶ 61,254 (1979). The Commission was thus well within its discretion in refusing to deny a license on the basis of a doubtful transgression.

Cooley correctly notes that the Commission's approach in analyzing Clifton's conduct was to examine "each incident in isolation, and explain[] why the incident didn't cause . . . particular concern." Petitioner's Brief at 38. She fails, however, to indicate why such an approach is improper. The Commission thoroughly addressed and eventually rejected each of her sundry claims.

While the Commission considered all of Cooley's various fitness arguments, it also accorded great weight to the public interest served by this small hydroelectric project, supplying electricity and saving nonrenewable fuels. In making its determination, the Commission weighed a number of factors, including the restoration to operation of a renewable energy source, the general safety of the project, its overall environmental impact, the additional power generated by allowing "flooding within the river's natural banks, and Clifton's general fitness.[20] Assessing all of these relevant considerations, the Commission reasonably concluded that granting a license to Clifton was in the public interest.

There was, however, some relevant evidence that the Commission improperly neglected to consider. Before the Commission issued its order denying rehearing, but months after the deadline for filing a new petition for rehearing, Cooley submitted evidence that Clifton had failed to pay both federal and local taxes and had de-

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[20] The Commission considered each of Cooley's arguments about Clifton's alleged unfitness as well as another not raised by Cooley—an earlier compliance matter in which Clifton's president had been involved on behalf of another project. J.A. at 170.

faulted on a loan agreement. The Commission denied consideration of this information on the technicality that it represented a new request for rehearing precluded by the 30-day statute of limitations. 16 U.S.C. § 825*l*. *See Borough of Weatherly, Pennsylvania*, 32 F.E.R.C. ¶ 61,398 (1985) (treating supplementary comments as new request for rehearing over which Commission has no jurisdiction beyond state of limitations). The Commission now admits, however, that the information might have been entered into the record through a petition to reopen the proceeding.[21]

We believe that the Commission erred in not addressing this possibility in its order. The Commission should have expressly, rather than implicitly, found that Cooley's supplementary evidence was insufficiently probative to justify reopening the record before dismissing her motion. The Commission should address even improperly styled motions to supplement the record under the relevant criteria.

Yet, at some point an agency must be able to say, "Enough is enough." We "normally reverse an agency's decision not to reopen the record only for an issue of discretion." *Eastern Carolinas Broadcasting Co.* v. *FCC*, 762 F.2d 95, 103 (D.C. Cir. 1985). We only order the Commission to reopen the record where it "clearly appear[s] that the new evidence would compel or persuade to a contrary result." *Friends of the River* v. *FERC*, 720 F.2d 93, 98 n.6 (D.C. Cir. 1983) (quoting *Rocky Mountain Power Co.* v. *FPC*, 409 F.2d 1122, 1128 n.21 (D.C. Cir. 1969)). Cooley's proffered evidence falls short of this barrier protecting agency discretion.

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[21] The ability to meet basic financial obligations incident to operation of a power plant is clearly relevant to the question of whether granting a license to a particular applicant is likely to serve the public interest. *See* John M. Jordan, 27 F.E.R.C. ¶ 61,435 (1985) (Commission will scrutinize fitness and ability to finance project).

Clifton does still own Clifton Mills No. 1. Its failure to meet several financial obligations apparently resulted in part from its inability to operate the project at full capacity under the injunction Cooley obtained from the district court. Clifton surmounted these financial difficulties and the license granted under § 4(e) will further bolster its economic viability. Thus, while the Commission's refusal to consider Cooley's late evidence is troubling, it is insufficient to justify reopening the record in this seven-year-old proceeding. Cooley has not demonstrated that the excluded evidence would affect the outcome in this case in which the Commission carefully considered a multitude of complaints and still concluded that licensing was in the public interest.

CONCLUSION

For the foregoing reasons, the order of the Commission granting a license to Clifton and denying Cooley's request for rehearing are affirmed.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

Project No. 4632-001

CLIFTON POWER CORPORATION

ORDER DENYING REHEARING

(Issued May 5, 1987)

On May 7, 1981, Clifton Power Corporation (CPC) filed a license application for the renovation and operation of the Clifton Mills No. 1 Project No. 4632, located on The Pacolet River in Spartanburg County, South Carolina. Prior to receipt of a license, CPC began operating the project and selling power to Duke Power Company. Consequently, the Commission conducted an investigation into CPC's activities at the project to determine whether CPC was violating Section 23(b) of the Federal Power Act (FPA), 16 U.S.C. § 817, by commencing operation of the project and selling the electric power it produced before the Commission had acted on CPC's license application. Under the circumstances presented in the investigation, the Commission decided not to devote its resources to pursue the issue of whether unlicensed operation of the Clifton project violated Section 23(b), since such

a finding might not be possible. *Clifton Power Corp.*, 31 FERC ¶ 61,279, at p. 61,576 (1985), *reh'g denied*, 34 FERC ¶ 61,161 (1986). On June 6, 1986, the Commission issued a license to CPC for the continued operation of the Clifton Mills No. 1 Project No. 4632,[1] pursuant to its authority under Section 4(e) of the FPA, 16 U.S.C. § 797(e), which we held is broader than the prohibition against unlicensed construction or operation contained in Seciton 23(b).

Marjories Linder Cooley, an intervenor in this proceeding, timely filed a request for rehearing of the Commission's June 6, 1986 order.[2] Ms. Cooley argues that, when the Commission cannot require a license under Section 23(b), it does not possess the authority to issue a license under Section 4(e). Ms. Cooley claims the Commission has consistently dismissed license applications for projects which were not subject to Section 23(b), and that the Commission's holding to the contrary will permit involuntary third party takings. Ms. Cooley further claims that the Commission erred in finding that the project affects the interest of interstate or foreign commerce, failed to consider issues relating to the licensee's fitness, and erred in concluding that Section 21 of the FPA, 16 U.S.C. § 814, authorizes CPC to condemn Ms. Cooley's land.

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[1] *Clifton Power Corp.*, 35 FERC ¶ 61,303 (1986).

[2] On February 3, 1987, Ms. Cooley filed a supplement to her rehearing request. Any subsequent filing supplementing or revising a rehearing is in essence a new request for rehearing which is precluded by the 30-day statutory limitation for rehearings under § 313(a) of the FPA, 16 U.S.C. § 8351(a). *See Borough of Weatherly, Pennsylvania*, 32 FERC ¶ 61,398 (1985). Accordingly, we will reject Ms. Cooley's supplement to the rehearing request.

Additionally, Ms. Cooley filed motions for stay of the order issuing license on January 24, February 3 and February 11, 1987. Since we deny the rehearing request, we also deny the motions as moot.

I. Discussion

A. Licensing Authority Under Section 4(e) of the FPA

As noted, in the order issuing the license for the Clifton Mills Project No. 4632, we issued the license pursuant to the authority given the Commission in Section 4(e) of the FPA to license project works across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states.[3] Ms. Cooley argues that where it has not been shown, as here, that Section 23(b) requires licensing, Section 4(e) does not authorize the Commission to issue a license, even on voluntary application by CPC. Ms. Cooley says on rehearing that the Commission erred in concluding that Section 4(e) confers "independent licensing authority" or that the Commission has any jurisdiction over the Clifton Mills Project.

1. The plain wording of Section 4(e)

Section 4(e), in pertinent part, authorizes and empowers the Commission

> [t]o issue licenses . . . for . . . project works . . . for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States . . ., or for the

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[3] The Clifton Mills Project is located on the Pacolet River, which has not been determined to be navigable at the site, although downstream the Pacolet River has been found to be navigable. *Milliken and Co.*, 18 FERC ¶ 62,155 (1982). However, the Pacolet River is a tributary to the navigable Broad River, and thus is a stream over which Congress has jurisdiction under the Commerce Clause. This fact is not challenged on rehearing and thus is not an issue in the proceeding.

> purpose of utilizing the surplus water or water power from any Government dam . . . .

Thus the language is "obviously broad"[4] and with respect to Commerce Clause waters plainly authorizes the licensing of project works across, along, from, or in any of such waters.

The wording relating to Commerce Clause waters comes from the 1935 amendments to the 1920 Federal Water Power Act.[5] Prior to these amendments, the Commission was authorized and empowered to license project works across, along, from, or in "navigable waters of the United States" instead of the present wording on Commerce Clause waters; the rest of the language quoted in the preceding paragraph was the same as now.

In the same 1935 amendments, Congress also amended the Federal Water Power Act in two other respects dealing with licensing of project works. First, Section 23 was amended to, among other things, require licensing for the construction, operation, and maintenance of certain kinds of project works. Significantly, Congress, in Section 23(b), also made mandatory the filing of declarations of intention to construct project works

> across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States

and also provided that, if on investigation the Commission shall find

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[4] *Lake Ontario Land Development & Beach Protection Ass'n. v. F.P.C.*, 212 F.2d 227, 231 (D.C. Cir. 1954).

[5] Title II of the Public Utility Act of 1935, 49 Stat. 838. This title made the Federal Water Power Act into Part I of the FPA and added Parts II and III of the FPA. Subsequent amendments are not relevant here.

> that the interests of interstate or foreign commerce would be affected by such proposed construction[,]

licensing would be required. Second, Congress added the present Section 4(g) of the FPA to authorize and empower the Commission to investigate any occupancy or intended occupancy, for the purpose of developing electric power, among other things, of

> streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States and to issue orders it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water power resources of the region.

The foregoing demonstrates the use by the Congress of language that defined Commerce Clause waters when it dealt with matters respecting licensing under the FPA. Additionally, there is demonstrated the distinction that Congress drew between, on the one hand, location on Commerce Clause waters, and, on the other hand, location on Commerce Clause waters together with the meeting of further specified requirements. For example, for mandatory licensing of some project works under Section 23(b), Congress required the location of the project works on Commerce Clause waters and, further, that the proposed construction of the project works would affect the interests of interstate or foreign commerce.[6] Thus Congress obviously was aware of the difference between mere location on Commerce Clause waters and the imposition of further requirements beyond such location. In some instances, it imposed additional requirements.

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[6] Another example, dealing with licensing under the FPA and unchanged by the 1935 amendments, is the definition of navigable waters in Section 3(8) of the FPA. The first part of this definition uses the Commerce Clause waters language, and then the second part specifies additional requirements to meet the definition of the term.

Yet, in Section 4(e), authorizing the Commission to issue licenses (as distinguished from other provisions requiring licensing for construction, operation, and maintenance of project works), Congress imposed only one standard, namely, that the location of the project works be across, from, along, or in Commerce Clause waters. Thus, the plain wording of Section 4(e) fully supports the Commission's decision to issue a license for the Clifton Mills Project No. 4632 on such waters. Had Congress intended that the authority to license under Section 4(e) should be limited (on streams not found to be navigable) to those situations where Section 23(b) requires licensing, it would have been a very simple matter to track in Section 4(e) the language Congress used in Section 23(b). But Congress did not do that. Instead, with respect to such streams, Congress chose to use only a part of the Section 23(b) mandatory licensing provision, namely, the location on Commerce Clause waters, and to omit the requirement of a finding that the project affects the interests of interstate or foreign commerce. Similarly, Congress included in Section 4(e) no distinction between pre- and post-1935 construction, as was done in Section 23(b).

2. Legislative history

Even though the language of Section 4(e) makes absolutely no reference to Section 23(b), Ms. Cooley argues that the legislative history of the 1935 amendments, primarily statements made at Congressional hearings, shows that the licensing authority under Section 4(e) simply tracks, and is coextensive with, the Commission's authority to require licensing, for the construction, operation and maintenance of project works, under Section 23(b). We do not believe her references to legislative history are sufficient to overcome the plain wording of Section 4. The Supreme Court has stated that

> the starting point for interpreting a statute is the language of the statute itself. Absent a clearly ex-

> pressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 198 (1980). *See also Escondido Mutual Water Co. v. La Jolla Indians*, 466 U.S. 765, 772 (1984). Moreover, other somewhat more authoritative portions of the legislative history show support for the plain wording of Section 4(e).

As indicated by Ms. Cooley,[7] the *Appalachian*[8] litigation undoubtedly was involved in the process of the Commission's proposing to Congress the legislation that became the 1935 amendments and, thereby, Part I of the FPA. On May 6, 1935, prior to enactment of the 1935 amendments, the United States filed in federal district court the complaint that led to the Supreme Court's *Appalachian* decision. One of the issues in that proceeding was whether, because of the language in the Federal Water Power Act that before the 1935 amendment, only authorized the Commission to issue licenses on navigable waters,[9] the Commission had authority to license project works on non-navigable streams when those project works would affect downstream navigable capacity and thus affect the interests of interstate or foreign commerce.[10]

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[7] Rehearing, pp. 2-6.

[8] *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

[9] It was, of course, this very language that the 1935 amendments changed to read "on streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States" and that is being considered in this proceeding.

[10] As of 1935, the point most likely had much more than "some value as an irritant" (*see* rehearing, p. 6) insofar as the Commission was concerned, because the district court later ruled the Commission's authority was limited to navigable waters, citing among

Accordingly, the statements referenced by Ms. Cooley, made during the Congressional hearings by Mr. DeVane, the Commission's solicitor at the time, should be read in light of the fact that *Appalachian* was to be litigated. Further, the matters being discussed directly related to some of the points to be litigated. (In general, the cited statements of Mr. DeVane are to the effect that the amendment to Section 4(e) did not add anything to the act).

But even aside from the *Appalachian* litigation, Mr. DeVane's statements during the hearings are not a clear expression of legislative intent contrary to the plain wording of Section 4(e). Additionally, some of the statements of Mr. Devane's are not inconsistent with the plain wording, and in other respects they are qualified by other statements.[11]

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other things, the pertinent section of the Federal Water Power Act. 23 F. Supp. 83, 110 (1938). The court of appeals later affirmed. 107 F.2d 769 (1939). The Supreme Court in *Appalachian* later did not reach this issue and instead ruled that the stream is navigable water.

[11] For example, Mr. DeVane also testified:

> Mr. DeVane. We are not seeking by any amendment that we propose to enlarge the jurisdiction of the Commission in the waters of the United States over which Congress has control.
>
> Mr. Holmes. I understood you to say you were, so that you could control other than navigable waters.
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> Mr. DeVane. That is the law today.
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> Mr. Holmes. Then I misunderstood you in that regard.
>
> Mr. DeVane. Well, I would like to make that perfectly clear. We are not extending the power. We are not proposing any amendment that extends the power of the Commission over any waters of the United States that they do not have power over today—not at all.
>
> Mr. Holmes. Well, take my own State of Massachusetts, where they are building a tremendous water reservoir to supply the

In proposing the amendments to the Federal Water Power Act, the Commission submitted to the House and Senate Committees at the hearings not only the text of the proposed amendments showing the changes to the existing law but also a memorandum explaining those amendments. This memorandum [12] stated:

> The provision of section 4(d), relettered (e), authorizing the Commission to issue licenses, is broadened. As now worded, this section authorizes the issuance of licenses for projects in the navigable waters of the United States. Under section 23 of the act, however, authority is given to license projects on nonnavigable waters where interstate commerce is affected. For the purpose of combining these two grants of power in a single section, it is proposed to state the licensing power in section 4(e) as a general power to license projects in streams or other bodies of water over which Congress has jurisdiction under the Commerce Clause . . . .

Thus the Commission's memorandum clearly showed that it proposed to broaden its licensing authority and that it

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metropolitan area of Boston. Would they have to get a license here to put in a hydroelectric plant at these various dams?

Mr. DeVane. If they were on any stream over which Congress has jurisdiction, yes, sir.

Mr. Holmes. Well of course there is a question involved in that particular point.

Mr. DeVane. I mean that is the law today. We are not making any change in that regard. We are not suggesting any change in that regard.

Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 376 (1935) (House Hearings).

[12] House Hearings, 384, 389, Hearings on S. 2796 before the Senate Committee on Interstate Commerce, 74th Cong. 1st Sess. 223, 235 (1935) (Senate Hearings).

proposed the licensing power be stated as a "general power" to license projects on Commerce Clause waters.

The Committee reports [are] not inconsistent with the plain wording of the statute. The Senate Committee report states: [13]

> In section 4(d), here relettered (e), the provisions authorizing the Commission to issue licenses are brought together in one general grant of power. As now worded, this section authorizes the issuance of licenses for projects in the navigable waters of the United States. Under section 23 of the act, *however*, authority is given to license projects on non-navigable waters where interstate commerce is affected. In combining these two grants of power, the Commission is granted authority to issue licenses for projects in "streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states." The provisions for the issuance of licenses on public lands and for the utilization of surplus power of Government dams are left unchanged. . . .

The House Committee report is substantially the same.[14] Both reports on the new Section 4(e) recognized the addi-

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[13] S. Rep. No. 621, 74th Cong., 1st Sess. 43 (1935).

[14] H.R. Rep. No. 1318, 74th Cong., 1st Sess. 23 (1935). This report states:

> The Commission's present licensing powers are brought together in subsection (e), an amendment of the present subsection (d). This section now authorizes the issuance of licenses on navigable waters of the United States. Section 23 of the act authorizes the licensing of projects on non-navigable waters where interstate commerce is affected. It was thought desirable to combine these two grants of power by providing for the licensing of projects in "streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states."

tional requirement in Section 23(b) that interstate commerce be affected, but neither included that requirement in Section 4(e). Instead, both reports used, and actually quoted in full, the statutory language defining the waters on which the Commission was empowered and authorized to issue licenses. Thus these Committee reports are hardly inconsistent with the plain wording of the statute.

The only relevant floor debate of which we are aware also supports the plain wording. In the House, Mr. Reece offered an amendment to the bill that would have returned the pertinent language of Section 4(e) to the wording it had in the Federal Water Power Act. Mr. Crosser [15] opposed the amendment. The points made in the floor statements show that Congress was well aware of the import of the language it chose to use. Mr. Reece in support of his amendment stated in part the following:

> The present Water Power Act does not give licensing power to the Federal Power Commission over nonnavigable streams, and if the language now incorporated in the pending bill should be enacted into law, the Federal Water Power Commission will be given a licensing jurisdiction over all streams because in some degree at least the upstreams do affect the navigability of the streams below. The Commission now has power to regulate the upstreams if the flow is interfered with in such a way as to affect the navigability of the down streams. But it does not have licensing power over nonnavigable streams; that jurisdiction belongs to the States.
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> The Federal Government, in the first place, does not have authority to interfere with the authority of the states in this respect and it ought not to exercise it if it does have authority to do so.

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[15] Messrs. Reece and Crosser were both members of the Committee on Interstate and Foreign Commerce.

Mr. Crosser, opposing the Reece amendment, stated the following:

> Mr. Chairman, the language contained in this [Committee] amendment simply clarifies what is already the law of the land. What the opposition would like to do is to limit the authority of the Power Commission to the navigable waters and to only those parts of the streams that are actually navigable. This [Committee] amendment gives the Power Commission the right to regulate not only the waters that are actually navigable but other waters over which Congress has jurisdiction by virtue of its right to regulate interstate commerce.
>
> Mr. Chairman, I think it would be a great mistake and would do great harm if this [Reece] amendment were to be adopted. There can be no possible doubt that those who are interested in real regulation of water power desire to vote down this [Reece] amendment, and I urge them to defeat it overwhelmingly.

Mr. Reece's amendment was rejected. 79 Cong. Rec. 10,568 (1935).

Accordingly, the pertinent legislative history[16] is consistent with and even supports the plain wording of Section 4(e).

3. Arguments respecting Section 4(e) in the context of Part I of the FPA

Ms. Cooley argues that, aside from her view that the legislative history "conclusively shows" that Section 4(e) is not a grant of authority independent of Section 23(b), other factors confirm that construction of Section 4(e).[17]

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[16] The conference report, H.R. Rep. No. 1903, 74th Cong., 1st Sess. (1935), reconciled the differences between the House and the Senate that existed with respect to other sections of Part I of the FPA but does not discuss Section 4(e).

[17] Rehearing, p. 11.

First, Ms. Cooley argues that if the 1935 amendments gave a separate basis for Section 4(e) jurisdiction on voluntary applications, as the Commission decided in the June 6, 1986 order, its enactment would have been attended by far more attention than is reflected by the legislative history. Of course, Ms. Cooley's portrayal of the legislative history is different from that given above. But the legislative history shows that the Commission proposed its amendments to the Committees setting out the changes to the existing law; the Commission presented memoranda to the Committees explaining the proposed amendments; members of the Commission and its staff appeared at the hearings; the Committee reports quoted the actual language being put into Section 4(e),[18] and there was even consideration of a further floor amendment to Section 4(e) with the colloquy between two Committee members on the import of the Committee amendment (which adopted the Commission's proposed amendment) and the policy considerations involved. There may, of course, be many reasons why any particular legislative proposal may generate a greater or lesser volume of legislative history, as compared to other proposals. In the instant case, too, one should remember that the amendments to the Federal Water Power Act, that became Part I of the FPA, were only a small part of the Public Utility Act of 1935. Title I of the 1935 act, the title that constituted the Public Utility Holding Company Act of 1935, was a major, controversial enactment, as is shown by the legislative history. Title II of the 1935 act, in addition to amending the Federal Water Power Act, enacted the provisions that became Parts II and III of the FPA. Both the holding company provisions and the Parts II and III additions to the FPA involved new, major areas of regulation.

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[18] Section 4(e) is one of the few sections of the amendments to the Federal Water Power Act for which both Committees set out the amended language by "quotation marks," thus inviting particular attention to the change in wording.

For these reasons, we think the first argument is unpersuasive.

The second argument is that the Commission's reading of its Section 4(e) authority is to allow that section to swallow, and make superfluous, Section 23(b). This argument apparently fails to recognize the distinctions between a provision that empowers the issuance of licenses on voluntary application for a class of projects, and a different provision that makes licensing mandatory for a narrower class of projects. We fail to see any defect or inconsistency in having two such provisions in a statute.

Ms. Cooley also asserts that the proper construction of Section 4(e), that it is "coextensive" with Section 23(b), is given in the 1970 *Farmington* decision wherein the Commission stated that the 1935 amendments made "Section 4(e) coextensive with the original scope as well as the revised version of Section 23(b)." [19] Ms. Cooley further states that this case was "impliedly repudiate[d] without proper acknowledgment" by the June 6, 1986 order. The Commission's decision in *Farmington* had held that Section 23 of the 1920 act enabled it to require licensing of a pre-1935 project. On appeal the order of the Commission was vacated, the court stating that the Commission's insistence that the 1920 Act can now be read to have required a license on and after its passage is "groundless and untenable." [20] Thus, aside from the fact that the order was actually vacated, the statement of the two sections being coextensive would appear to have little if any remaining validity inasmuch as the Section 23 side of the "coextensive" equation was struck down. Additionally, after stating the Commission's insistence to be groundless, the court stated:

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[19] *Farmington River Power Co.*, 44 FPC 1393, 1396 (1970).

[20] 455 F.2d at 89. The court also found Section 23(b), added by the 1935 amendments, to be nonretroactive. At 90-91.

> It [the insistence] is tantamount to the assertion that because Congress gave the Commission jurisdiction to issue licenses on voluntary application by the one undertaking such a project on a non-navigable stream,[11] it also gave the Commission the power to make such licenses mandatory.
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> [11] Before 1935 it was not completely clear that the Commission could issue licenses for projects on non-navigable streams because under § 4(d) of the 1920 Act, the Commission was only authorized to grant licenses for projects in navigable waters. In practice, however, the Commission took implied authority from § 23 and issued licenses anyway.

455 F.2d at 89.

While the quoted language does not clearly state that the Commission actually has under Section 4(e) such authority to issue licenses on voluntary application for projects on Commerce Clause waters, and the language is probably *dictum* in any event, it undercuts whatever support the *Farmington* litigation might otherwise offer for Ms. Cooley's position.

In connection with her discussion of *Farmington*, Ms. Cooley also brings in Section 4(g) of the FPA, asserting apparently that that section confers no substantive authority to require licenses that is different from that covered by Section 23(b). That section of the FPA, of course, has not been an issue in this proceeding in that in licensing the Clifton Mills No. 1 Project the Commission made no attempt to invoke whatever authority it may have under that section. Further, Ms. Cooley's rehearing request (at p. 13) does not clearly indicate what relevance Section 4(g) might have to any issue in this proceeding. However, the obvious implication of the assertion is that if Section 4(g) confers some broader authority to require licensing than does Section 23(b), then Ms. Cooley's argument that Sections 4(e) and 23(b) are coextensive is made even more difficult to support. This is so because if Section 4(g) confers some

broader authority to require licensing than does Section 23(b), and Sections 4(e) and 23(b) are coextensive as Ms. Cooley argues is shown by the legislative history, then Section 4(e) would not empower the Commission to issue licenses that may be required by Section 4(g). Accordingly, in such a situation the legislative intent behind Section 4(e) would have been to resolve the one *Appalachian* problem and at the same time create another *Appalachian* problem.

We do not think it necessary for decision in this proceeding to resolve the question of the full meaning of Section 4(g), and thus we do not attempt to do so. But this decision should not be understood to acquiesce in a proposition that Section 4(g) is purely nonsubstantive. As noted above, the section was added by the 1935 amendments, at the same time the language of the present Section 4(e) was amended. The language of the section is broad. As stated by the Commission in its memorandum to the Committees,[21] the purpose was

> to authorize the Commission to investigate the occupancy of power sites on waters subject to its jurisdiction. The subsection would enable the Commission to proceed against those who are using power sites without having secured licenses, and thus more adequately protect the water resources committed to its care.

The precise import of the section is not fully resolved. In *Nantahala Power and Light Co. v. F.P.C.*, 384 F.2d 200, 210 (4th Cir. 1967), with reference to Section 4(g), the court in apparent *dictum* stated in part:

> . . . In no event would be disposed to accept the . . . view that the section is merely procedural. Not only is the section physically separated from the pro-

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[21] Senate Hearings, *supra*, at 236; House Hearings, *supra*, at 389.

> cedural provisions [footnote omitted], but it evinces a meticulous design to conserve the national interest.

Then, also apparently in *dictum*, the court in *Farmington, supra*, 455 F.2d at 90, stated, without reference to *Nantahala*, that the section "was added to increase the enforcement powers of the Commission," "was only designed to permit the Commission to proceed on its own," and "was not a general delegation of authority to require licenses apart from other statutory standards." But in *Puget Sound Power & Light Co. v. F.P.C.*, 557 F.2d 1311 (9th Cir. 1977), where the court had found that the construction involved did not constitute post-1935 construction under Section 23(b) so that under that section licensing was not required, the court, in an Order on Request For Clarification, stated that "[i]t appears that the Federal Power Commission may be authorized and empowered to take action on its own motion under 16 U.S.C. 797(g) [Section 4(g)]." *Puget Sound Power & Light Co. v. F.P.C.*, No. 75-3523 (9th Cir.) (unreported Order dated Oct. 14, 1977, filed Oct. 17, 1977).

Ms. Cooley's third argument is essentially that because Congress, in Section 23(a) of the FPA, offered "fair value" licenses to holders of valid pre-1920 permits or rights-of-way who chose to give up their existing Federal authorizations and secure licenses, but did not offer "fair value" licenses to those who were to come along later and whose projects were not shown to require licensing but who voluntarily sought a license, the Congressional intent was that the Commission is not empowered to issue licenses for the latter class.

We do not think the argument persuasive. There may, of course, be various reasons why Congress would treat or not treat different situations or different classes in the same way. Additionally, there are meaningful distinctions between the two classes of projects.[22] For ex-

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[22] These distinctions may possibly have led the Commission to propose that it be given general authority to issue licenses on

ample, the first class consisted generally of those projects for which the federal authorization was required, and was received in the pre-1920 years. For the second class, it was determined that federal authorization was not needed, and such projects could be constructed, operated, and maintained with or without federal authorization. As another example, the first class already held federal authorizations and may have been thought to have rights or equities pursuant to those authorizations. This was not true for the second class. As a third example, some of the authorizations in the first class had been granted without term.[23] Accordingly, there could have been particular reasons to offer an "incentive" to bring the projects in the first class under the regulation of the FPA or its predecessor act.

4. Prior Commission practice

Ms. Cooley argues[24] that the Commission's prior practice has been to consistently disclaim jurisdiction over projects constructed on non-navigable waters prior to 1935 and that a reversal of that practice would create serious problems in the administration of the FPA.

In support of her argument on prior practice, she cites a number of dismissed applications for license and other cases wherein the Commission on petition for

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voluntary application for projects on Commerce Clause waters but not to include a provision that such licenses be "fair value" licenses —a proposal that we think Congress adopted in the 1935 amendments.

[23] *See, e.g.*, 31 Stat. 264 (1900), 32 Stat. 802 (1903). The statutes do contain the right to alter, repeal or amend. *See also, Northwest Power Company v. F.P.C.*, 344 F.2d 47 (8th Cir. 1965); *Minnesota Power & Light Co. v. F.P.C.*, 344 F.2d 53 (8th Cir. 1965). It was not until the General Dam Act of 1910, which changed the General Dam Act of 1906, that Congress imposed a 50-year term along with other provisions. 36 Stat. 593 (1910); 34 Stat. 386 (1906).

[24] Rehearing at 16.

declaratory order has determined that licensing is not required. But it is not entirely accurate to characterize either of these two kinds of cases as disclaimers of jurisdiction. Rather, they are determinations that on the basis of available evidence licensing has not been shown to be required.[25] In this respect the cases are similar to the order terminating the show cause proceeding for this project, noted above, whereby the Commission decided not to devote its resources to pursue the issue of whether unlicensed operation of the project violated Section 23(b).

Ms. Cooley argues that, in the years since enactment of the 1935 amendment to Section 4(e), the Commission has never attempted to rely on that section as an independent basis for licensing and therefore that the licensing of the Clifton Mills No. 1 Project is wrong. It appears there is no articulated Commission precedent on the subject of voluntary licensing under Section 4(e) of the FPA, although one Commission order states that the Section 4(e) authority to issue licenses is broader than the Section 23(b) requirements for licensing. *Tufflite Plastics, Inc.*, 13 FERC ¶ 61,016 (1980). All but one of the orders cited by Ms. Cooley as dismissing license applications were orders of the Commission's staff pursuant to delegated authority.[26] We are unaware of any

[25] Further, the basic pattern of the orders is to provide that the dismissals are without prejudice to any future determinations, on new or additional evidence, that licensing is required. *E.g., Hotel Baker*, 18 FERC ¶ 62,035 (1982); *Niagara Mohawk Power Corp.*, 12 FERC ¶ 62,106 (1980), *Aquenergy Systems, Inc.*, 29 FERC ¶ 61,026 (1984). Additionally, we recognize that the order in *Hotel Baker*, issued by delegated authority, is captioned in part to be a finding of no jurisdiction. This, however, is an apparently inadvertent aberration. Moreover, the text of the order and the Ordering Paragraph make it clear that the order is only a determination that on the basis of available evidence licensing is not required.

[26] It is not clear whether the applicants identified by Ms. Cooley did in fact "actively seek a license" to operate their project. The applicants, with the exception of one, filed their license applications

prior Commission order squarely addressing the matters we have addressed herein. In at least one instance though, the Commission itself in a somewhat different context distinguished the language of Sections 4(e) and 23(b) and specifically stated that licensing requirement is not as broad as the scope of the licensing authority of Section 4(e). *Tufflite Plastics, Inc.*, 13 FERC ¶ 61,016 (1980). But in any event, an agency does not lose a power that it fails to assert.[27] Indeed, Justice Goldberg, in his dissent to the *Taum Sauk* decision, observed that the jurisdictional basis affirmed by the Supreme Court in that case had not been advanced by the Commission from 1920 to 1962.[28] In this case, the issue of voluntary licensing under Section 4(e) was squarely raised by a response by CPC filed on July 26, 1985, to a motion to dismiss by Ms. Cooley. The fact that the issue is one of first impression before the Commission should, of course, not affect the resolution of the issue. The surfacing of the issue at this time is perhaps to be expected in view of the greatly increased interest in small hydropower projects at about the time this application for license was filed.

Additionally, with respect to the question of prior practice, we note that in the orders dismissing licensing applications, issued under delegated authority, it appears that on the face of the orders there was at best an in-

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between 1965 and 1971, a period in which the Commission was trying to bring existing unlicensed projects before it for licensing. At least three applicants opposed issuance of a license: *Pepperell Paper Company*, 1 FERC ¶ 62,209 (1980), *Western Massachusetts Electric Company*, 7 FERC ¶ 61,126 (1979), and *Connecticut Light & Power Company*, 8 FERC ¶ 62,076 (1979).

[27] *See United States v. Morton Salt Co.*, 338 U.S. 632, 647-48 (1950).

[28] *F.P.C. v. Union Electric Co.*, 381 U.S. 90, 112 (1965) (Goldberg, J., dissenting).

consistent practice of dismissing applications when it was not established that Section 23(b) required licensing.[29]

Finally, Ms. Cooley argues that the Commission's grant of voluntary licenses, which she views as a change from prior practice, will allow non-owners to obtain licenses for, and wrest from their current owners, legally operating unlicensed pre-1935 projects on non-navigable streams. Such projects are already susceptible to any license applications which propose additional generating capacity or other post-1935 construction within the meaning of Section 23(b), and which are therefore within the parameters of Section 23(b).[30] In any event, the Commission issues a license only upon a finding that the project will be best adapted to a comprehensive plan to develop the waterway for beneficial public purposes. If the Commission were to determine that no valid public purpose would be served by one developer merely replacing another, it could decline to grant the license. Fur-

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[29] *E.g., City of Gonzales, Texas*, 12 FERC 62,134 (1980) (project located on "a stream subject to the jurisdiction of Congress under its authority to regulate commerce"; power would be used in City's municipal distribution system; no mention of effect of project on interstate or foreign commerce); *Traverse City Light and Power Board*, 28 FERC ¶ 62,430 (1984) (project located on "a stream subject to the jurisdiction of Congress under the Commerce Clause"; no reference to post-1935 construction; no mention of effect of project on interstate or foreign commerce); *Tuscarora Yarns, Inc.*, 31 FERC ¶ 62,273 (1985) (project located on "a stream subject to the jurisdiction of Congress"; no reference to post-1935 construction; no mention of effect of the project on interstate or foreign commerce).

[30] Ms. Cooley asserts that the Commission's position on Section 4(e) is an improper attempt to do indirectly what it cannot do directly: require licensing. However, we see no compulsion where a project operator decides, as a matter of business judgment, to obtain a voluntary license in order to protect itself from the potential that an outsider may file for and obtain a license for the project because it proposes to construct project works to provide additional beneficial development at the site.

ther, we note that Section 14 of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, approved October 16, 1986, amended Section 9 of the FPA to require that an applicant for a license (other than a license under Section 15 of the FPA) notify by certified mail any person who is an owner of record of any interest in the property within the bounds of the project. This provides additional assurance that an owner of an unlicensed operating project, that perhaps was thought not to require licensing, will have notice in the event that someone else applies for a license for the project. Thus, the owner will have the opportunity to take whatever action the owner may deem appropriate, including the filing of a competing application. Additionally, we give notice that in the event the owner does file a competing application, and neither applicant proposes any changes to the existing, operating project, we will not necessarily apply the first-in-time rule of 18 C.F.R. § 4.37 (1986); if the owner does not file a competing application, we will, of course, carefully consider any objections the owner may have concerning the other application.

5. The Clifton project's effect on interstate commerce

Although the wording of Section 4(e) does not require a finding, as does Section 23(b), that the project will affect interstate or foreign commerce,[31] the order issuing the license made such a finding anyway.[32] On rehearing

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[31] While this order refers at times to affecting or effect on interstate or foreign commerce, the statutory language uses "interests of interstate or foreign commerce." The use of such language strongly implies that Congress "drew upon its full authority under the Commerce Clause." *Taum Sauk, supra*, 391 U.S. at 96.

[32] As Ms. Cooley points out (Rehearing p. 27), the order (slip op. 4) also stated that, "as discussed above, we have decided to not pursue the question of whether the project would affect the interests of interstate or foreign commerce." This statement inadvertently used incorrect language. What was obviously intended by the reference to the earlier discussion was that we had decided

Ms. Cooley observes that the Commission has licensed projects because of their effect on the interstate transmission of electric energy. But Ms. Cooley argues that the decision in *City of Centralia v. F.E.R.C.*, 661 F.2d 787 (9th Cir. 1981), established that the effect on interstate commerce must be "real and substantial" and that this 800-kW project's effect on interstate commerce is minimal.[33]

In *Centralia*, the court observed that the Commission erroneously chose to disregard commerce clause cases in other areas of regulation. The three cases specifically mentioned are *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); and *Wickard v. Filburn*, 317 U.S. 111 (1942). Observing further that had the Commission recognized the force of such cases, its finding might not have been crucially deficient, the court concluded that the record in that case failed to support the Com-

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"not to pursue the issue of whether a license is required by Section 23(b) of the FPA" (slip op. 3). The order issuing the license was, we think, clear from the language in the first paragraph of the order and the first ordering paragraph that we found that the Clifton Mills No. 1 Project affects the interests of interstate or foreign commerce.

[33] In this regard, Ms. Cooley refers (Rehearing p. 24 n.14) to a request for rehearing in *Cooley v. Clifton Power Corporation*, Docket No. EL85-37-000, in which she asked that the record in that proceeding be made a part of the record in this proceeding. Ms. Cooley now requests rehearing of the "failure" to include the record in Docket No. EL85-37-000 in the record for this license proceeding, but she offers no support for such a request or any showing how that record is relevant here. The earlier rehearing request was denied, noting that Ms .Cooley was a party to this licensing proceeding and was free to raise all matters she considered relevant to the issuance of a license. *Cooley v. Clifton Power Corporation*, 36 FERC ¶ 61,120 (1986). Inasmuch as that order denied the request and is a final order, the request cannot properly be raised anew at this time, particularly in the absence of any showing of justification. The request is therefore rejected.

mission's assumptions or its finding of effect on the interests of interstate or foreign commerce.

The situation in this case has, we think, some significant differences from that presented in the *Centralia* case. Of these differences, which are discussed further below, perhaps most notable are that CPC operates its project solely to sell the power output to Duke Power Company's (Duke) interconnected interstate electric system, and that CPC has qualifying facility status for its project as a small power production facility under Section 210 of the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3. Centralia, on the other hand, normally uses all power generated by its project to supply about 60% of its requirements for electricity and purchases from the Bonneville Power Administration (BPA) the other power that it needs; only occasionally, usually in the early morning hours (presumably when Centralia's need for electric power was low), did power from Centralia's project flow on BPA's lines that, according to the court's decision, formed a closed loop within the state. *Centralia*, *supra*, 661 F.2d at 789. The court also noted, *id.*, n. 7, that Centralia predicted the "minimal" reverse flows on BPA lines would cease and that Centralia since 1975 apparently received no credit from BPA for the reverse flows. It thus appears that after 1975 there was no compensation for the reverse flows.

CPC's project, if operated without the present restriction on reservoir elevation imposed by the court because of inundation of Ms. Cooley's parcel of land, has an estimated average annual output of 5,120 MWh. As noted in the order issuing the license, this project's use of the renewable resource is equivalent to the use of 8,140 barrels of oil or 2,370 tons of coal per year. In 1981 and 1982 respectively, Duke received 289 MWh, and 2,730 MWh from CPC, for which Duke paid CPC $5,214 and $72,835, according to Duke's Form 1. In

1983, 1984, and 1985, the respective figures were 2,704, 3,489, and 1,265 MWh and $44,876, $80,855 and $38,214.

Duke's system serves load in both North and South Carolina, and has generating facilities in the two states. Every generator in Duke's interstate system contributes energy to the system in order to maintain the balance in the system between generators and load. Any change in generation or load anywhere on the system affects every other generating unit on the system because all of the generating units are interlocked electromagnetically. *See F.P.C. v. Florida Power & Light Co.*, 404 U.S. 453 (1972); *Indiana & Michigan Electric Co. v. F.P.C.*, 365 F.2d 180 (7th Cir. 1966). Duke's system is directly interconnected with other electric systems, including Appalachian Power Company (operating in Virginia and West Virginia); Georgia Power Company (operating in Georgia); Carolina Power and Light Company (operating in North and South Carolina); as well as others. These other electric systems are in turn directly interconnected with still other systems, and the entire grid functions as an electromagnetic unit. Planning, construction, and operation are done not on just a state-by-state basis, nor on just a system-by-system basis, but also on a regional basis, by grouping of electric systems covering a number of states.

As stated by the Court, *F.E.R.C. v. Mississippi*, 456 U.S. 742, 747 (1982),

> it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect. [Citing *Florida Power & Light Co., supra.*]

To the extent that the Clifton project does or does not generate, the operation of Duke's electric system in the two Carolinas to that extent will have to adjust to main-

tain the required load-supply balance on the system. Assuming *arguendo* that the power from CPC's project is used to serve load within the state and thus does not itself cross the state line, as suggested by Ms. Cooley (Rehearing p. 24), there is nonetheless, to the extent that the project does or does not generate, an effect on the operation of the interstate system, because if the local load is not served by CPC's project, then it must be served by the other resources of the interstate system. The situation is thus similar to that in *Wickard v. Filburn, supra*, 317 U.S. at 128-29, where wheat consumed on the farm where grown competed with wheat in interstate commerce. The court found that if the farmer's homegrown wheat were entirely outside the scheme of regulation, it would have a substantial effect in defeating the purpose, to stimulate trade therein at increased prices. In the case of the FPA, a central purpose was "to provide for the comprehensive control over those uses of the Nation's water resources in which the federal government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power-uses which, while unregulated, might well be contradictory rather than harmonious." *Taum Sauk, supra*, 381 U.S. at 98. (Footnote omitted.) Thus, as with the home-grown wheat, if the projects such as CPC's were wholly outside the scheme of regulation, there would be a substantial effect in defeating the purpose of the statute.

Whether or not the project by itself has a real and substantial effect on interstate commerce, the Clifton Mills No. 1 Project is not an isolated project, even when one considers only the Pacolet River. In addition to this project, located at river mile 32.0, there are three other authorized projects and a fourth proposed project on the Pacolet River. An additional licensed project is located on the Broad River a short distance below the confluence of that and the Pacolet Rivers.

The Pacolet Project No. 2621 is located on the Pacolet River in Spartanburg County, South Carolina, at approximately river mile 21.4. The project has an installed capacity of 800 kW and generates an estimated 4,785 kWh annually. The Milliken Company received a Commission license on February 2, 1982, with power to be sold to Lockhart Power Company. 18 FERC ¶ 62,155 (1982). The project has qualifying facility status as a small power production faciilty under Section 210 of PURPA (QF85-267). Lockhart Power Company is the licensee for the project below the confluence of the Pacolet and Broad Rivers. 11 FERC ¶ 62,039, ¶ 61,287 (1980). Lockhart has one wholesale customer. *See* 10 FERC ¶ 61,282 (1980); 11 FERC ¶ 61,187 (1980). Lockhart also purchases power from Duke; Duke's Form 714 for 1985 reports delivery of 209,036 MWh to Lockhart.

The Clifton Mills No. 2 Project No. 4357 is located on the Pacolet River at river mile 29.4. The project has an installed capacity of 400 kW and generates an estimated 3,400,000 kWh annually. Tuscarora Yarns, Inc. received a Commission license for the project. 28 FERC ¶ 62,472 (1984). It appears that Tuscarora Yarns uses the power from the project and that it also is connected to Duke's electric system.

The Clifton Mills No. 3 Project No. 2185 is located on the Pacolet River at river mile 31.3. The project has an installed capacity of 2,000 kW and generates an estimated 6,845,000 kWh annually. The exemption from licensing was issued to Bluestone Energy Design, Inc. on October 1, 1984. Power is sold to Duke. A search shows no record of qualifying facility status under Section 210 of PURPA.

The Commission of Public Works of the City of Spartanburg holds a preliminary permit to study the proposed Lake Blalock Hydro Project No. 10022, on the Pacolet River, upstream of the other projects. Spartanburg pro-

poses a capacity of 2,500 kW with an estimated average annual generation of 9,300,000 kWh and a sale of all project power to Duke.

The foregoing demonstrates, we think, the interrelationship of these projects to and the effect of these projects on electricity as a basic element of interstate commerce. The Pacolet River, having a total length of some 60 miles, is of course only a small part of the nation's water resources. And the Clifton Mills No. 1 project and the other projects on the Pacolet River are only a small part of the hydroelectric power production facilities developed or being considered for development on those water resources.

Inasmuch as we are considering interstate commerce and the authority of Congress over interstate commerce, it is logical to consider the nation as a whole. This is supported, we think, by decisions on the exercise of commerce clause authority; this is also indicated by the reference to real and substantial effect on the "national interest" in *Centralia, supra*, 661 F.2d at 792, citing *Heart of Atlanta and Katzenbach v. McClung, supra*, and *Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517, 522-24 (9th Cir. 1972), *cert. denied* 412 U.S. 950 (1973).

That the Clifton Mills No. 1 project, as part of a national class of small projects, affects interstate commerce in a substantial way may be demonstrated by the foregoing discussion of the functioning of the interstate electric systems [34] and the functioning of projects on the

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[34] In concluding that the record there did not support the Commission's assumption or its findings, the court in *Centralia, supra*, 661 F.2d at 792, stated there was no demonstration that a reduction in power from Centralia's project would necessarily lead to increased consumption of BPA power generated in another state, and that such reduction might instead be accompanied by reduced consumption in Centralia or increased consumption of power generated elsewhere in the state. In connection with this, the court noted the

Pacolet River, and by reported data on developed and undeveloped hydroelectric power resources of the United States. Such data are reported in HYDROELECTRIC POWER RESOURCES OF THE UNITED STATES, DEVELOPED AND UNDEVELOPED, FERC Report

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concurring opinion to the Commission's decision in *Centralia*, suggesting that notice could be taken of electrical facts to support the decisions, but not identifying or explaining the significance of such facts.

In light of the *Centralia* court's concerns, some further comments on the functioning of the country's electric systems seem appropriate. As noted above, the systems function as an electromagnetic unit. Further, the systems function to meet the continuously changing load. Load, or the demand for electricity, is generally not dependent on the availability of given generating units or classes of units. Rather, to meet the standard of reliability of service, the system is planned and operated to be able to respond to serve load. Allowances are made for scheduled or unscheduled outages of equipment. All generating units contribute to maintain the stability of the system; for example, units held in reverse for contingencies also contribute. (Hydroelectric units are particularly valuable to meet increases in load, because, for example, of their quick response time and low outage rates.)

The contributions to an electric system by any one small unit will necessarily be small; the contribution by a class of small projects will be correspondingly greater in accordance with the number and size of units in any given class. Because of the extreme complexity of electric systems, to determine in detail how a large electric system would operate (under varying assumptions such as to load, availability of units, and exchanges of power with other systems) with and without a given unit (even a large unit) or a class of units, would require very elaborate and expensive studies.

We should also point out that in a limited number of situations, where a small hydroelectric project is located close to a state line and the configuration of the transmission system connecting the project to the interconnected system is suitable, it may only require relatively simple studies to show an actual flow of power across a state line. This, however, would not be the usual situation.

Accordingly, while we think it clear that small hydroelectric projects, at least as a class, have a real and a substantial impact on the interstate commerce of electricity, we do not think it generally feasible to attempt to quantify the impact.

0070 (1984). As of 1984, these collected data show, for example, that the nation's small plant (30 MW and less) capacity, developed, under construction, planned, and projected, to be roughly 16 million kilowatts from 3,827 sites. *Id.* p. xxxvi, Table XII. Similar data as of 1984 are given in the same table for projects of 15 MW or less and for project of 5 MW or less, also broken down for each size grouping into capacity and energy figures and whether developed, under construction, planned, or projected. These data as of 1984 show not only significant amounts of capacity and energy from projects that are developed or under construction, but even more significant amounts from projects that are planned or projected. The report, at p. xix, states the installed conventional hydroelectric capacity of the United States, as of January 1, 1984, to be 66.8 million kilowatts, of which a little more than half is federally owned, and, at p. xxi, the estimated conventional undeveloped power potential of the United States to be 77.3 million kilowatts. When compared to these figures, the figures for the small plants are also significant.[35]

An earlier study by the U.S. Army Corps of engineers shows comparable data. That 1981 study estimated that

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[35] The report, at p. xxi, also discusses retired hydropower plant sites, which Clifton Mills No. 1 was before being put back into operation by CPC.

> Retired hydropower plant sites also offer a significant potential for redevelopment. Within the United States there were more than 2,200 retired plant sites with about 1,300 megawatts of capacity that were identified in 1980 with potential for redevelopment. An additional 800 retired plants have been identified but without installed capacity data. With application of improved technologies and advanced engineering techniques, many of these sites are being redeveloped to yield a much greater generating capacity and energy output than was originally developed. . . . Out of 3,430 previously retired sites, 115 sites have been redeveloped during the last three years and are now on-line.

the roughly 2,000 "best" sites for hydroelectric power development had a potential capacity of about 46 million kW. NATIONAL HYDROELECTRIC POWER RESOURCES STUDY, U.S. Army Corps of Engineers, 1981, vol. 1, p. 11 and table 3.

The foregoing discussion demonstrates the substantial effect of the project, as part of a class of small projects, on the interests of interstate or foreign commerce. A demonstrable quantitative effect is not necessary. *Rasmussen, supra*, 472 F.2d at 524, quoting from *Heart of Atlanta, supra*, 379 U.S. at 258.[36]

Aside from this, there is yet an additional reason why the project has such an effect. That reason is that Congress in the enactment of PURPA, in Section 2 of that act, 16 U.S.C. § 2601, has found that the regulated activities, of which small power production facilities under Section 210 of PURPA are a part, have an immediate effect on interstate commerce. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 755-58 (1982). As noted above, the Clifton Mills No. 1 project is a small power production facility and has qualifying facility status. Thus the findings made by Congress with respect to small power production facilities generally, and confirmed by the Court as a legitimate exercise of Congress' Commerce Clause authority, should dispose of any doubt that the Clifton Mills No. 1 project affects the interests of interstate or foreign commerce.

II. Ms. Cooley's Request for Denial of the Application

Aside from asserting that the Commission has no jurisdiction to license the project, Ms. Cooley, in the alternative, argues that the Commission should deny the application for either of two reasons. The first of these is

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[36] See also *Rasmussen, supra*, 472 F.2d at 528 (the specific consequences may be speculative, but the reality of the impact is not).

the assertion that licensing serves no public interest or real regulatory purpose.[37] The second reason is the assertion that CPC has demonstrated a lack of fitness to qualify for the privilege represented by a license.

As to the first point, we concluded in deciding to issue the license, as required by Section 10(a) of the FPA, 16 U.S.C. § 803(a),[38] the project subject to the terms and

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[37] Ms. Cooley argues (Rehearing p. 24) that "[i]f the Commission can conclude, as it has, that its supervisory authority is not necessary for the construction, operation and maintenance of a 600 megawatt pumped-storage project to be part of an interstate transmission system," citing *Public Service Co. of New Mexico*, 10 FERC ¶ 61,273 (1980), then there is even less reason for the Commission to extend its authority to CPC's project. The reliance on the case is not well taken, we think, for that decision makes it clear that it was not the project that was being addressed, but rather the arroyo on which the project was to be located. The arroyo there is "an intermittent stream that carries water on only a few days even in the wettest years, and on those days flows average only about 1 to 5 cfs"; transit losses reduce even these flows an average of about 50 percent. 10 FERC at p. 61,530. The Commission concluded that the arroyo is not a stream over which Congress has Commerce Clause jurisdiction under Section 23(b), and thus, with respect to the question whether licensing was required, the injury was ended.

[38] Section 10(a) provides, in pertinent part, as follows:

> Section 10. All licenses issued under this Part shall be on the following conditions:
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> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes . . . .

While the order issuing the license used an abbreviated form of language, as has been the practice for several years, the abbreviated language is intended to constitute the full finding required by Section 10(a).

conditions of the license is best adapted to a comprehensive plan for development of the waterway for beneficial public uses, and issuance of the license is in the public interest. On rehearing, we find no reason to reach a different conclusion.

The project is admittedly a small project, one that is within the criterion for a minor license under Section 10(i) of the FPA, 16 U.S.C. § 803(i), i.e., it is a complete project of not more than two thousand horsepower installed capacity. But the act obviously contemplates the licensing of such small projects, even though the public benefits from such a project will be less than from a major project.

In deciding to issue the license, we considered all aspects of the public interest, including the troubling question of the applicant's fitness to be a licensee, discussed below. We recognized the efforts to restore to operation a renewable energy source that had been taken out of operation in 1971, and we also recognized that restoring the project to its earlier level of operation would require the use of about one-half acre of undeveloped riverfront property, part of a larger parcel owned by Ms. Cooley.[39] We considered Ms. Cooley's objection to this use of her land along with the fact that without this use of the land the power output would be reduced by about one-third from the amount of generating capacity that would otherwise be available. We considered such matters as safety of the project, water quality, endangered species, cultural resources, and overall impacts affecting the quality of the human environment. We considered the regulatory purposes that would be served by licensing the

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[39] *See Cooley v. Clifton Power Corp.*, 747 F.2d 258 (4th Cir. 1984). We were also aware that on remand the district court determined Ms. Cooley's land, involved in this case, to be worth about $500 per acre and the annual rental value of the one-half acre strip of land to be $25. *Cooley v. Clifton Power Corp.*, No. 83-0619-14 (D. S.C. Feb. 5, 1985).

project subject to appropriate terms and conditions of license, the conditions that are contained in Form L-12 entitled "Terms and Conditions of License for Constructed Minor Project Affecting the Interests of Interstate or Foreign Commerce," [40] and the special articles made part of the license by the order. Many of the standardized conditions of the license will frequently have a rather general and more long-term than immediate impacts, but these conditions from the date of the license will nonetheless govern the conduct of the licensee with respect to the licensed project. A minimum flow provision, such as Article 20, however, provides a more concrete and readily perceived result of the licensing of the project. If there were no restrictions and the project owner were free (in the absence of the license) to operate the project as he chooses, to maximize the power benefits perhaps, then marked fluctuation of streamflow below the project could occur.[41] Another concrete result of licensing the project is, of course, that if the project owner becomes a licensee and acquires the right of eminent domain pursuant to Section 21 of the FPA, 16 U.S.C. § 814, then the project owner can acquire the right to flood the small parcel of

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[40] *See* 54 FPC 1871 (1975). Among the many matters covered by these articles are: requirement for coordinated operation of project with other projects or power systems (Article 8); provision for additional capacity or other changes (Article 7); control of project use of streamflow (Article 9); provisions for joint use of project properties (Article 10); and provisions for public free access to project waters and adjacent project lands (Article 13).

[41] The Clifton Mills No. 1 Project has about a 150-acre foot reservoir and the powerplant has a hydraulic capacity of about 550 cfs (cubic feet per second) when operating at rated head. While various flow conditions could be assumed, if one assumes 100 cfs streamflows, an 8-foot drawdown of the reservoir, and no minimum flow requirement, the project could operate at the hydraulic capacity of 550 cfs for about 2.7 hours and then use all the available streamflow for about 12 hours to refill the reservoir. This would reduce the streamflow below the project to 0 cfs for that 12-hour period and thus produce substantial and adverse streamflow fluctuation below the project.

land owned by Ms. Cooley, and the project can be operated at its full capacity to make adequate use of the renewable energy resource provided by the site.

Thus it is our judgment that the licensing of the project meets the requirements of Section 10(a) of the FPA and is in the public interest.

On the second point, the asserted lack of fitness of CPC to be a licensee, Ms. Cooley argues that the Commission erred in failing to address the fitness issue (Rehearing pp. 37-38) and that the Commission should deny the license application because of three matters of CPC's conduct that, Ms. Cooley asserts, demonstrate the lack of fitness of CPC to be a licensee (Rehearing pp. 25-35). The three matters of conduct relate to (1) violations of a court injunction requiring CPC to maintain the project reservoir elevation so as not to overflow Ms. Cooley's parcel of land; (2) CPC's commencement of operation of its project before receipt of a license; and (3) CPC's failure to file with the Commission a notice of qualifying facility status until Ms. Cooley had filed with the Commission a complaint against CPC concerning the matter.

The order issuing the license admittedly does not discuss in any detail the fitness issue raised by Ms. Cooley. The order (slip op. p. 3 n.7) makes it clear, however, that the Commission did consider the fitness issue "based on the facts contained in the record of both the show cause proceeding and the instant licensing proceeding." We concluded that a license should be issued. On rehearing we have considered the three matters of conduct raised by Ms. Cooley on rehearing, as noted above, as well as a fourth matter previously considered, all of which are discussed more fully below. We conclude that while the questions of past conduct are troubling and do show less than a fully acceptable standard of past conduct, they are not of sufficient stature to justify denial of the license.

Our reasoning basically is this. Fitness of an applicant is certainly a relevant matter to be considered in deciding whether to issue a license (and in determining what conditions are appropriate to be included if we decide to issue a license).[42] But denial of an application on the ground of lack of fitness is nonetheless a strong sanction, perhaps second only to revocation of a license, which is provided for in Part I of the EPA.[43] But between these two approaches, i.e., denial before issuance and revocation after issuance in the event of certain proscribed misconduct, the FPA also provides means, short of revocation, to secure licensee's compliance, if necessary either directly (Section 314) or by providing for forfeitures or penalties (Sections 31, 315, and 316 of the FPA).[44] Thus, the Commission is not limited to a choice only between denial of the application or the possibility of a revocation proceeding in the event of certain proscribed misconduct by a licensee. There are compliance procedures available to us, and we will use these procedures in appropriate situations. It was in this context that we considered the

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[42] Fitness of an applicant is not a matter expressly addressed in the lincensing provisions of Part I of the FPA; Section 4(e), for example, speaks only of issuing licenses to, basically, citizens, associations of citizens, domestic corporations, states, and municipalities. We think it clear, though, that fitness is a matter that is within the broad public interest considerations covered by Section 10(a).

[43] Section 26 and now, as added by Section 12 of ECPA after issuance of the license, the new Section 31 of the FPA.

[44] As noted above, ECPA, which, among other things, added Section 31 to the FPA, was not yet enacted at the time the license was issued to CPC and thus was not part of the Commission's consideration and decision at that time. It is now part of the FPA, applicable to this project under Section 18 of ECPA. We refer to it here also to call attention to the new enforcement provision. A significant feature of Section 31(c) is that it provides for a civil penalty tin an amount not to exceed $10,000; this may be contrasted to Section 315, which provides for a forfeiture in an amount not to exceed $1,000.

question of past conduct and concluded that the license should be issued to CPC.

With respect to the first matter raised by Ms. Cooley on rehearing, the violations of a court injunction, a federal district court, on two separate occasions, found CPC in violation of the court's order enjoining CPC from letting its reservoir rise above elevation 588.3 and thereby overflow Ms. Cooley's parcel of land.[45]

It appears, though, that there were some intervening circumstances involved with respect to the violations. While we do not suggest these circumstances in any way justify or excuse violation of the court's order, they do help to place the matter in some perspective for the purpose of better evaluation. On April 24, 1986, one day after the court hearing on the second violation, CPC filed a complaint with the Commission against Bluestone Energy Design (BED), the exemption holder for the Clifton Mills No. 3 Project No. 8185, which is located upstream from CPC's project. In its complaint, CPC alleged that BED's operation of its project causes the pool level at CPC's project to rise above the court imposed 588.3 feet, m.s.l. The parties, after efforts to resolve the complaint, reached an agreement concerning project operations. By letter dated November 21, 1986, the Director, Division of Inspections, approved the agreement and directed BED to install a pond level monitoring device and to inform CPC each time BED begins power generation. From the Bluestone complaint matter and the transcript of hearing before the court on April 23, 1986 (Hearing), Attachment A to Ms. Cooley's rehearing request, it appears that the violations came about, not because of some purposeful intent to circumvent the court's order, but because of difficulties CPC had in adequately matching its operation

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[45] *Cooley v. Clifton Power Corp.*, No. 83-0619(D) S.C. April 29, 1985); *Cooley v. Clifton Power Corp.*, No. 83-0619-14 (D. S.C. April 23, 1986).

to the varying inflow to its project so as to maintain the reservoir elevation within the court's requirement. It seems clear that, in the view of the court, it was not a matter of being "a bad fellow." Hearing at 23; *see also* 18.

On Ms. Cooley's second point, the argument is based on CPC's filing of its verified license application in May 1981, that included the statement of post-1935 installation of a generator, and CPC's commencement of operation and sale of project power in July 1981 before it had received authorization by issuance of a license. Ms. Cooley argues that, in light of the statement in the application, CPC's commencement of operation and sale of project power show CPC's apparent willingness in 1981 to "disregard the requirements" of the FPA (Section 23 (b), which seemed to require licensing on the indicated facts) and the Commission's regulations (which provided that no work may be started on a project until reciept of a license).[46]

We agree with Ms. Cooley that, particularly in view of the short period of time between the filing of the application and the commencement of sale of project power, there appears to be an inference of willingness to disregard the requirements of the FPA, particularly Section 23(b). Our files show no record of CPC's advising the Commission of different information on the date of installation of the generator, and amending its application to reflect the different information, until issuance of the show cause order in 1983.

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[46] Ms. Cooley's argument based on the Commission's regulations may be made irrespective of whether licensing was required, i.e., the argument may be that once an application is filed, the regulations prohibit work on the project regardless of whether licensing in required. If that is a thrust of the argument, we think it cannot be persuasive for the purpose of establishing justification for denial of the application.

On the other hand, the Enforcement Section of the Office of the General Counsel conducted a preliminary non-public investigation into CPC's activities at the project, and we issued a show cause order and after consideration of the matter decided to terminate the show cause proceeding. 31 FERC ¶ 61,279 (1985). No violation of Section 23(b) of the FPA has been established, and therefore operation of the project was not illegal. Even if we were to pursue the question and were able to determine finally that there was a violation of Section 23(b), we do not think that determination would justify denial of application on the ground of lack of fitness, particularly in view of the factual disputes that surround the question of whether licensing is required.[47]

Ms. Cooley's third point concerns CPC's failure to file a notice of qualifying facility status, which was the subject of a complaint dismissal by the Commission after filing of the notice. *Cooley v. Clifton Power Corp.*, 34 FERC ¶ 61,151 (1986); 36 FERC ¶ 61,120 (1986). Ms. Cooley seems to acknowledge that this failure has significance only in the context of other failures to meet regulatory requirements.

The fourth matter, not raised by Ms. Cooley but one that was considered by the Commission in deciding to issue the license, concerns Project No. 4021 and a compliance matter that arose on that project while Saranac Energy Corporation (Saranac) was the licensee. The

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[47] There are, of course, other remedies that might be appropriate, in the event of failure to comply with Section 23(b), *e.g.*, backdating the effective date of the license, *Niagara Mohawk Power Co. v. F.P.C.*, 379 F.2d 153, 157-59 (D.C. Cir. 1967), or return of monies received because of the unauthorized, illegal operation. *Cumberland Power Corp.*, 26 FERC ¶ 61,344 n. 3 (1984); *Deep River Hydro*, 31 FERC ¶ 61,280, at p. 61,578 (1985); *STS Consultants, Ltd.*, 33 FERC ¶ 62,477 n. 4 (1985); compare *Chris S. Difani*, 27 FERC ¶ 61,261 (1984).

connection between that matter and this proceeding is that Mr. Charles Mierek, the president of CPC, was, through much of the time of the compliance matter, very much involved for Saranac in that compliance matter. The compliance matter on Saranac arose in connection with Part 12 of the Commission's regulations on safety matters, 18 C.F.R. Part 12, and concerned disputes between Saranac and the Commission's Regional Engineer as to what was to be appropriately required under these regulations and the terms and conditions of the license. While Saranac had much earlier submitted an emergency action plan, the Regional Engineer had found inadequacies in the plan. When the safety matters were not resolved in what seemed to be a reasonable time, the Commission instituted a suit in federal district court to compel compliance. Three days after the suit was filed, Saranac resubmitted its emergency plan. The safety concerns were then satisfactorily resolved, and a consent decree was entered, with Saranac neither admitting nor denying allegations of the Commission's complaint.

We do not dispute a licensee's right to challenge requirements that may be placed upon it because of the license. Additionally, the matter demonstrates the usefulness of formal compliance procedures to handle such compliance matters if they arise. Thus, while it is troubling that compliance procedures should be needed to resolve such matters, particularly ones relating to safety, we think the matter does not establish conduct that would justify denial of the license.

Accordingly, we do not think any of these matters justify the denial of the license on the ground of lack of fitness. Taken together they may show a pattern of conduct that is less than what we would like to expect. But even then, the strong sanction of denial of license is in our view not warranted.

III. Eminent Domain Authority Under Section 21 of the FPA

Ms. Cooley asserts (Rehearing p. 36) that the Commission erred in concluding that Section 21 of the FPA, 16 U.S.C. § 814 (1982), authorizes a licensee to acquire the lands of others, in the absence of Commission findings that the project is an improvement that, in the words of Section 21, is "in the judgment of the Commission" "desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce."

Ms. Cooley argues, first, that it is not clear that Section 21 authorizes condemnation in connection with a project that is already constructed and in service and, second, that it has not been shown that the project is for the use or benefit of interstate or foreign commerce.

With respect to the first argument, Section 21 provides licensees an avenue to acquire the rights to use or damage the lands or property of others necessary to the "construction, maintenance or operation" of project works.[48] Thus, the language is in no way limited to construction or initial construction; it also applies to operation and maintenance. Section 21 therefore does not restrict the licensee to the right of eminent domain solely for the construction of a new project that improves or develops a waterway. In any event, the Clifton Mills No. 1 Project, inoperative for over 10 years until operations recommenced on July 10, 1981, redevelops and improves the site to yield a greater generating capacity and energy output.

With respect to the second argument, we believe that Ms. Cooley's assertion that the Commission's neglect to

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[48] Actually, the statute speaks of "dam, reservoir, diversion structure, or the works appurtenant or accessory thereto", thus indicating a congressional choice of broadly worded language.

make a finding that the project is for the use and benefit of interstate commerce, which is prerequisite to Clifton's authority to condemn property, is itself erroneous. We evaluated Clifton's project pursuant to the directives enumerated in Section 10(a) of the FPA, and found that the project is best adapted to a comprehensive plan for development of the Pacolet River Basin for beneficial public uses and that the issuance of the license was in the public interest. We believe that our Section 10(a) finding, albeit an abbreviated one,[49] was appropriate. Section 10(a) provides that a project to be licensed will "in the judgment of the Commission" "be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . ." With respect to the exercise of the Commission's "judgment" and the "improving or developing a waterway for the use or benefit of interstate or foreign commerce," Section 21 and 10(a) employ identical concepts.

The pertinent language appeared in Section 21 as a Committee amendment[50] and was adopted on the Senate floor without explanation.[51] The conference report stated, apparently with respect to the language in question, that the amendment "states the conditions under which the right [of eminent domain] may be exercised."[52] There is thus little in the legislative history of the 1920 Act to provide specific guidance on what Congress intended when it adopted this language. This language in question had also appeared in a second administration draft of Section 4(d), the draft having been presented with a cover letter stressing the need for the legislation and

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[49] As noted above, the use of the abbreviated or more concise form is intended to be the full Section 10(a) finding.

[50] S. Rep. No. 180, 66th Cong., 1st Sess. 18 (1919).

[51] 59 Cong. Rec. 1226 (1920).

[52] H.R. Rep. No. 910, 66th Cong., 2d Sess. 13 (1920).

the beneficial effect of the passage of the bill on the nation's electric power industry.[53] However, the language was not included in Section 4.

The pertinent language was included in Section 10(a) by the 1935 amendments. In amending Section 10(a), Congress apparently borrowed the language in Section 21 and adopted the language "for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce" instead of the more limited "for the purposes of navigation." In essence, this change to Section 10(a) mirrors the change made in what is now Section 4(e), and discussed above in the first part of this order. Moreover, the process of amending Section 10(a), to include the language being considered, gives no indication that Congress intended to have different meanings apply to the use of the same language in Sections 10(a) and 21.

We are unaware of any court decision that interprets this language of Section 21, and a review of past Commission cases reveals only one instance in which the Commission was asked to make a specific Section 21 finding, distinguished from the usual Section 10(a) finding. On October 21, 1939, at the request of the Brazos River Conservation and Reclamation District (Brazos), licensee for Project No. 1490, the Commission made a Section 4 (e) and Section 21 finding. The Commission stated that it had previously determined that the project would "be best adapted to a comprehensive plan for improving or developing a waterway for the use or benefit of interstate or foreign commerce." The Commission stated further that, because (a) the operation of the project will have the direct effect of increasing the flow during low-water periods, and (b) the operation of the project will have the direct effect of reducing flood flows, the Brazos

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[53] H.R. Rep. No. 715, 65th Cong., 2d Sess. 29, 32 (1918).

River would be "better adapted to the uses and benefits of interstate or foreign commerce." 2 FPC 632 (1939).

The Commission obviously treated Section 21 in the context of Section 10(a). Apparently relying on its previous Section 10(a) finding, the Commission concluded that, by reason of the effects of licensing, the Brazos River would be "better adapted" to the uses and benefits of interstate or foreign commerce.

As discussed above, it is the Commission's judgment that the Clifton Miss No. 1 Project promotes the comprehensive development of the affected water resources. The project, under the terms and conditions of the license, has a beneficial effect on the interests of commerce. It restores to operation a facility that uses a renewable resource for the production of electric power. The public benefits of the increased power production that are achievable at no further cost other than the inundation of Ms. Cooley's small parcel of land justify, we think, the inundation of that land. Accordingly, licensing the Clifton Mills No. 1 Project, and others like it that meet the requirements of Section 10(a), represents an improvement which is for the use or benefit of interstate or foreign commerce.

A further reason to conclude that the Clifton Mills No. 1 Project is an improvement for the use or benefit of interstate or foreign commerce arises from the fact that the project is a small power production facility under Section 210 of PURPA. As stated by the Court in *Mississippi*, *supra*, 456 U.S. at 750:

> Section 210 of [PURPA] seeks to encourage the development of cogeneration and small power production facilities.[11] Congress believed that increased

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[11] . . . A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. [16 U.S.C.] 796(17(A).

> use of these sources of energy would reduce the demand for traditional fossil fuels. . . .

The Court went on to discuss how Congress in Section 210 of PURPA addressed problems that it felt impeded the development of such generating facilities. Congress was implementing its Commerce Clause authority, *id.* at 753-58, and thus, in light of the encouragement of such generating facilities, it can hardly be said that the Clifton Mills No. 1 Project is not an improvement for the use and benefit of interstate or foreign commerce.[54]

The Commission orders:

(A) The request for rehearing filed by Ms. Cooley on July 7, 1986, is denied.

(B) The supplement to the request for rehearing filed by Ms. Cooley on February 3, 1987, is rejected.

(C) The motions for stay filed by Ms. Cooley on January 27, 1987, February 3, 1987, and February 11, 1987, are denied.

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[54] If further information is desired as to the nature of Congress' conclusions that have relevance to projects such as CPC's, such information can be gathered from the legislative history specifically referred to by the Court (*id.*, at 756-57) and by other legislative history. For example, the Senate Committee on Energy and Natural Resources recognized the "potential contribution of low-head hydroelectric projects, cogeneration facilities and small power production facilities" to the achievement of the purposes of PURPA, S. Rep. No. 442, 95th Cong., 1st Sess. 10 (1977). H.R. Rep. No. 543, 95th Cong., 1st Sess., Vol. 1 at 5 (1977) states that an increase in our reliance on oil imports would greatly constrain our foreign policy and could do considerable damage to our economy.

APPENDIX C

LICENSE, JURISDICTION

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt, and C. M. Naeve.

Project No. 4632-000

CLIFTON POWER CORPORATION

ORDER ISSUING LICENSE (MINOR)

(Issued June 6, 1985)

On May 7, 1981, Clifton Power Corporation (CPC) filed a license application for the continued operation of the Clifton Mills No. 1 Project 4632. The project is located on the Pacolet River in Spartanburg County, South Carolina, and affects the interests of interstate commerce.

Notice of the application has been published, and comments have been received from interested Federal, state, and local agencies. Marjorie Linder Cooley and Catherine Linder Corbin petitioned for and were granted intervention. The significant concerns of the intervenors are discussed below.

A. JURISDICTION

The dam at Clifton Mills No. 1 was constructed prior to 1888. A flood in 1928 destroyed the dam; in 1929 it

was rebuilt to a 17-foot height and designed as a run-of-the-river hydroelectric project. The reservoir does not affect natural flood flows. Two generators, each with a capacity of 400 kW, generate the electrical power that is currently being sold to Duke Power Company for distribution within its system.

In 1966, Dan River Mills, Inc. purchased the facilities and applied for a license (Project 2625). The Commission issued a license for the project on October 22, 1970.[1] On rehearing, Dan River sought to withdraw the license application, claiming that the project was no longer feasible. On April 12, 1971, Dan River advised the Commission that generation at the project had been discontinued and that the generators would be disconnected. The Commission accepted withdrawal of the application for license and rescinded the order issuing license.[2] Subsequently, CPC purchased the project.

CPC has redeveloped the project[3] by cleaning and repairing the generators and turbines. No repair or recon-

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[1] Dan River Mills, Inc., 44 F.P.C. 1267 (1970).

[2] Dan River, Inc., 51 F.P.C. 1861 (1974).

[3] The Clifton Mills No. 1 project, as redeveloped, consists of: an existing concrete buttress-type dam approximately 363 feet long and 17 feet high; an existing reservoir with a surface area of 15 acres with a maximum storage capacity of 150 acre-feet at a normal pool elevation of 594 feet m.s.l.; an existing powerhouse located approximately 25 feet downstream of the dam, containing two generating units with a total capacity of 800 kW; and appurtenant facilities. Approximately 200 feet from the powerhouse is a set of three single-phase transformers. The powerline between the powerhouse and transformers is owned by CPC. All power lines beyond the transformers are owned by Duke Power Company. A more detailed project description is contained in ordering paragraph (B). The project is operated on a run-of-the-river basis. The average annual generation is expected to be 5,120 MWh. Operation of this project would utilize a renewable resource that would save the equivalent of approximately 8,140 barrels of oil or 2,370 tons of coal per year.

struction was required of the dam, powerhouse, tailrace or any of the retaining walls. Only the switch yard equipment required major overhaul.

After filing its application for license but prior to receiving a license, CPC rehabilitated and began operating the Clifton Mills No. 1 project. CPC began generating power in July 1981, and commenced selling power to Duke Power Company on July 10, 1981. Upon learning these facts, the Commission staff conducted an investigation into CPC's activities at the project to determine whether CPC was violating Section 23(b) of the Federal Power Act (FPA), 16 U.S.C. § 817, by operating the project and selling the electric power it produced before the Commission had acted on CPC's license application.[4] As a consequence of that investigation, the Commission issued an order on November 15, 1983 (Docket No. EL84-3-000), directing CPC to show cause why it should not be ordered to cease operating the Clifton Mills No. 1 project until such time as a license is issued by the Commission.[5] On June 4, 1985, the Commission terminated the show cause proceeding, stating:

> Under the circumstances presented in this case, we see no compelling reason for using our resources to pursue at hearing the question of whether unlicensed operation of the Clifton project violates section 23 (b), especially when, upon examination of the record

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[4] Section 23(b) prohibits unlicensed construction, maintenance, or operation of a hydroelectric project if (1) the project is located on a body of water over which Congress has jurisdiction pursuant to its authority to regulate interstate and foreign commerce; (2) on or after August 26, 1935, construction ("post-1935 construction") occurred at the project (*see* Farmington River Power Co. v. FPC, 455 F.2d 86 (2d Cir. 1972)); and (3) the Commission has not determined that the project does not affect the interests of interstate or foreign commerce.

[5] Clifton Power Corporation, 25 FERC ¶ 61,225 (1983).

> at hearing, it is possible that we might find CPC is not in violation of section 23(b).

31 FERC ¶ 61,279 at 61,576 (1985). However, although the Commission has decided not to pursue the issue of whether a license is required by Section 23(b) of the FPA, it must still decide whether to grant CPC's request for a license issued pursuant to Section 4(e) of the FPA.

The Commission's authority under Section 4(e) to issue licenses is broader than the prohibition against unlicensed construction or operation contained in Section 23(b). Section 4(e) authorizes the Commission to issue licenses for projects on waters over which Congress has Commerce Clause jurisdiction.[6] Section 23(b) prohibits the construction, maintenance, or operation of a post-1935 project located on Commerce Clause waters unless the Commission determines that the project would not affect the interests of interstate or foreign commerce (*see* note 4, *supra*). We have determined that the Pacolet River, on which the Clifton Mills project is located, is a water over which Congress has jurisdiction. However, apparently there was no post-1935 construction at the Clifton

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[6] Section 4(e) of the FPA, 16 U.S.C. § 797(e), authorizes the Commission to issue licenses "for the purposes of constructing, operating and maintaining dams, . . . reservoirs, power houses . . . or other project works . . . for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce . . . ." Congress originally restricted the Commission's licensing jurisdiction to projects across, along, from or in "any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States". *See* Section 4(d) of the Federal Water Power Act of 1920. In 1935, Congress amended this language to extend the Commission's licensing jurisdiction to projects across along, from or in "any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce." 16 U.S.C. § 797(e).

Mills project, and, as discussed above, we have decided to not pursue the question of whether the project would affect the interests of interstate or foreign commerce. Thus, CPC may seek, but is not required to obtain, a license for its Clifton Mills project.[7]

B. INTERVENORS' CONCERNS

Intervenors, Majorie Linder Cooley and Catherine Linder Corbin, oppose issuance of the license. They own undeveloped shoreline property which they claim has been flooded by the project reservoir since the project began operation in July 1981. On November 1, 1984, the U.S. Court of Appeals for the Fourth Circuit determined that, under South Carolina law, CPC owes damages to Cooley for flooding her land as a result of operating the Clifton project.[8] The Court of Appeals instructed the U.S. District Court for the District of South Carolina to enter an injunction requiring CPC to lower the level of the reservoir upstream from the project to a level not exceeding 588.3 feet m.s.l.[9] On remand, the district court entered a

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[7] On June 27, 1985, Majorie Linder Cooley, an intervenor, filed a motion requesting dismissal of the license application or, in the alternative, an evidentiary hearing. Cooley argues that jurisdiction under Section 23(b) of the FPA does not exist in the instant proceeding and that therefore the Commission cannot issue a license to CPC. In the alternative, Cooley argues that an evidentiary hearing should be ordered to determine if Section 23(b) jurisdiction exists and whether CPC is fit to be a licensee. Since we conclude that we have jurisdiction to issue a license to CPC under Section 4(e) of the FPA, it is unnecessary to set for hearing the question of whether we also have jurisdiction to issue the license under Section 23(b). In addition, based upon the facts contained in the record of both the show cause proceeding and the instant licensing proceeding, we do not believe that an evidentiary hearing on the issue of CPS's fitness to be a licensee is warranted. Accordingly, we will deny Cooley's motion.

[8] Cooley v. Clifton Power Corp., 747 F.2d 258 (4th Cir. 1984).

[9] *Id.* at 263. This level is approximately 5.7 feet lower than the normal pool elevation of the reservoir upstream from the dams, as described in the Commission's notice of CPC's license application

final judgment on January 7, 1985, incorporating this injunction.[10] However, issuance of the license to CPC gives the power to acquire Cooley's land, pursuant to Section 21 of the FPA, 16 U.S.C. § 814.

C. SAFETY AND ADEQUACY

All project structures, machinery, and appurtenant facilities were analyzed and inspected by the Commission's staff for safety and adequacy. Staff finds the project works to be safe against sliding and overturning under various normal and extreme loading conditions, and the project spillway capacity is adequate and sufficient to pass the probable maximum flood. It is concluded that the project, under the conditions of this license, is safe and adequate.

D. ENVIRONMENTL CONSIDERATIONS

1. *Water Quality Certification*

The South Carolina Department of Health and Environmental Control has issued a water quality certificate for the project in accordance with Section 401 of the Federal Water Pollution Control Act.

2. *Minimum Flow*

The U.S. Department of the Interior (DOI) states that during project operation adverse impacts to the biological resources of the river result from dewatering the shoal area of the river below the dam. In an effort to ensure that operation of the facility will be compatible with the area's fish and wildlife resources, DOI recommends that an instantaneous minimum flow of 20 cubic feet per second (cfs) to released from the dam. The Applicant agrees to release the recommended flow. Release of a

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[10] In effect, the injunction reduces the available head at the project, and thereby the amount of electric power that the project can generate, by about one-third.

minimum flow through the bypased reach will make available additional aquatic habitat to be utilized by aquatic organisms indigenous to the project area. Article 21 requires the Licensee to release a minimum flow of 20 cfs from the project dam to protect and enhance the fish resources of the bypassed reach.

3. *Endangered Species*

No known federally listed threatened or endangered species would be affected by the project.

4. *Cultural Resources*

No known archeological or historic sites will be affected by the continued operation of the project. Article 22 requires the protection of archeological or historic sites in the event of any future construction at the project.

E. FINDING OF NO SIGNIFICANT IMPACT

Continued operation of the project will not result in any adverse impacts to the environmental resources of the project area. The provisions of the license articles included herein will protect cultural resources from any impacts associated with any future construction at the project site, and, in addition, will protect and enhance the fish resources of the Pacolet River.

In accordance with the National Environmental Policy Act of 1969, an Environmental Assessment was prepared for the Clifton Mills Project No. 1 No. 4632.[11] On the basis of the record and staff's independent environmental analysis, issuance of a license for the project, as condi-

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[11] "Environmental Assessment, Clifton Mills Project, FERC No. 4632— South Carolina, March 28, 1985", prepared by the Division of Environmental Analysis, Office of Hydropower Licensing, Federal Energy Regulatory Commission. This document is available in the Division of Public Information and in the Commission's public file associated with the proceeding.

tioned herein, will not constitute a major Federal action significantly affecting the quality of the human environment.

F. OTHER ASPECTS OF COMPREHENSIVE DEVELOPMENT

The Clifton Mills No. 1 project does not conflict with any existing or proposed developments on the Pacolet River. This project will develop the river flow and head within practical limits. It is concluded that, upon compliance with the terms and conditions of this license, Project No. 4632 is best adapted to a comprehensive plan for development of the Pacolet River Basin for beneficial public uses, and issuance of this license is in the public interest.

It is ordered:

(A) This license is issued to Clifton Power Corporation (Licensee), of Clifton, South Carolina, under Part I of the Federal Power Act (Act), for a period effective the first day of the month in which this license is issued and terminating 30 years thereafter, for the continued operation and maintenance of the Clifton Mills No. 1 Project No. 4632, located in Spartanburg County, South Carolina, on the Pacolet River and affecting the interests of interstate or foreign commerce. This license is subject to the terms and conditions of the Act, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Act.

(B) The Clifton Mills No. 1 Project No. 4632 consists of:

(1) All lands, to the extent of the Licensee's interests in those lands, constituting the project area and enclosed by the project boundary. The project area and boundary are shown and described by certain exhibits that form

part of the application for license and that are designated and described as:

Exhibit	FERC No. 4632	Showing
K-1	1	Site Plan

(2) Project works consisting of: (1) a concrete slab and buttress type dam approximately 363 feet long and 17 feet high with three tainter gates each 16.5 feet high by 25 feet wide; (2) a reservoir with a surface area of 15 acres with a maximum storage capacity of 150 acre-feet at a normal pool elevation of 594 feet m.s.l., (3) a headworks structure approximately 100 feet long containing three vertical type wooden gates approximately 12 feet wide by 12 feet high; (4) a powerhouse located approximately 25 feet downstream of the dam, containing two generating units with a total capacity of 800 Kw; (5) a 12.47 kV transmission line; and (6) appurtenant facilities.

The location, nature, and character of these project works are generally shown and described by the exhibits cited above and more specifically shown and described by certain other exhibits and reports that also form a part of the application for license and that are designated and described as:

Exhibit	FERC No. 4632-	Showing
L-1	1	Plan Sections

(3) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection with the property, located within or outside the project boundary, as approved by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibits K and L, designated and described in ordering paragraph (B) above, are approved and made a part of the license.

(D) Pursuant to Section 10 (i) of the Act, it is in the public interest to waive the following sections of Part I of the Act, and they are excluded from the license:

Sections 4(b), except the second sentence; 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived here; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 14, except insofar as the power of condemnation is reserved; 15; 16; 19; 20; and 22.

(E) This license is also subject to Articles 1 through 18 set forth in Form L-12 (revised October, 1975), entitled "Terms and Conditions of License for Constructed Minor Project Affecting the Interests of Interstate or Foreign Commerce," attached to and made a part of this license. The license is also subject to the following additional articles:

Article 19. (a) In accordance with the provisions of this article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purllse of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the use of, and ensure compliance with the covenants of the instrument of con-

veyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) noncommercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time where said facility is intended to serve single-family type dwellings; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands and waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction; (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site; and (3) determine that the proposed construction is needed and would not change the basic contour of the

reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modifications of those standards, guidelines, or procedures.

(c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintentance of bridges where all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into

project waters, for which all necessary Federal and State water quality certificates of permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface evaluation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any Federal or State agency official consulted, and any Federal or State approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the

project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 20. The Licensee shall pay the United States the following annual charges, effective as of the first day of the month in which this license is issued:

> For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for this purpose is 1070 horsepower.

Article 21. Licensee shall discharge from the Clifton Mills No. 1 Project Dam, a continuous minimum flow of 20 cubic feet per second or the inflow to the reservoir, whichever is less, for the purpose of protecting and enhancing aquatic resources in the Pacolet River. These flows may be temporarily modified if required by operating emergencies beyond the control of the Licensee, and for short periods for fishery management purposes upon mutual agreement between the Licensee and the South Carolina Wildlife and Marine Resources Department.

Article 22. Licensee shall, prior to any future construction at the project, consult with the South Carolina Department of Archives and History (SHPO) about the need for cultural resource survey and salvage work. Documentation of the nature and extent of consultation, including a cultural resources management plan and a schedule to conduct any necessary investigation prior to such construction, and a copy of a letter from the SHPO

accepting the plan, shall be filed with the Commission within 6 months of any construction activity in the location of such investigations. Licensee shall make available funds in a reasonable amount for any such work as required. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and Licensee shall consult with the SHPO cannot agree on the amount of money to be expended on archeological or historical work related to the project, the Commission reserves the right to require Licensee to conduct, at its own expense, any such work found necessary.

(F) Marjorie Linder Cooley's motion to dismiss license application or in the alternative, for an evidentiary hearing, filed on June 27, 1985, is denied.

(G) This order is final unless an application for rehearing is filed within 30 days from the date of its issuance as provided in Section 313(a) of the Act. The filing of an application for rehearing does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically ordered by the Commission. Failure of the licensee to file an application for rehearing shall constitute acceptance of this license. In acknowledgement of acceptance of this license, the license shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

(SEAL)

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

APPENDIX D

SECTION 4(e) OF THE FEDERAL POWER ACT, AS AMENDED, 16 U.S.C. § 797(e)

Section 4. The Commission is authorized and empowered—

• • • •

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army.

Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

APPENDIX E

SECTION 23(b) OF THE FEDERAL POWER ACT, AS AMENDED, 16 U.S.C. § 817

Section 23(b). It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

(2)

No. 88-242

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARJORIE LINDER COOLEY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission is empowered by Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), to grant licenses to voluntary applicants for hydroelectric plants built prior to 1935 even though it may not require that such plants obtain licenses under Section 23(b) of that Act, 16 U.S.C. 817.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 843 F.2d 1464. The order of the Federal Energy Regulatory Commission (Pet. App. 65a-80a) is reported at 35 F.E.R.C. ¶ 61,303. The Commission's order denying rehearing (Pet. App. 20a-64a) is reported at 39 F.E.R.C. ¶ 61,117.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. On July 7, 1988, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 9, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), provides in pertinent part:

> The Commission is authorized and empowered—
>
> To issue licenses * * * for the purpose of constructing, operating, and maintaining dams * * * or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States.

Section 23(b) of the Federal Power Act, 16 U.S.C. 817, provides:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam * * * or other works incidental thereto across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person * * * intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of

such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person * * * shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

STATEMENT

This case involves a challenge to orders issued by the Federal Energy Regulatory Commission ("the Commission") in which the Commission granted a license for a small hydroelectric plant to Clifton Power Corporation (Clifton). Petitioner contends that the Commission had no statutory authority to grant Clifton a license.

1. In May 1981, Clifton applied to the Commission for a license to operate a small hydroelectric plant on the Pacolet River, a nonnavigable stream in Spartanburg County, South Carolina (Pet. App. 2a).[1] At the time of the application, the plant was idle. However, the Commission's predecessor, the Federal Power Commission, had issued a license to an earlier owner.[2]

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[1] The application was for a "short form license (minor)." A "minor water power project" is any water power project that would have a total installed generation capacity of 2000 horsepower (1.5 megawatts) or less. See 18 C.F.R. 4.30 (b) (17).

[2] Pet. App. 66a. See *Dan River Mills, Inc.*, 44 F.P.C. 1267 (1970). The license was subsequently rescinded at Dan

In July 1981, before any license was issued, Clifton began operating the project and selling the power it generated to Duke Power Company. In February 1982, petitioner Marjorie Linder Cooley, who owns approximately 97.68 acres of land upstream from the project, moved to intervene in the license proceeding, alleging that Clifton's operations were unlawful and had resulted in the flooding of a small portion of her property (Pet. App. 2a-3a & n.1). She opposed issuance of any license to Clifton.[3]

After learning that Clifton had begun to operate the project and to sell power from it, the Commission staff began an investigation into whether Clifton was violating Section 23(b) of the Federal Power Act (the "FPA" or "Act"), 16 U.S.C. 817 (Pet. App. 67a). This section prohibits operation of a project constructed after 1935 on a stream affecting interstate commerce without a license issued by the Commission. In response to an order to show cause, Clifton claimed that the plant had been constructed before 1935. Pet. App. 3a. Thereafter, the Commission terminated the show cause proceeding, citing the pos-

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River's request when it reported that the project was no longer feasible. *Dan River, Inc.*, 51 F.P.C. 1861 (1974). (In the remainder of this Brief, the term "Commission" refers to FERC and the FPC as the context requires.)

[3] While participating as an intervenor in the licensing proceeding, Cooley also initiated a series of state and federal lawsuits against Clifton, seeking damages and injunctive relief against the project. Ultimately, she obtained a ruling from the Fourth Circuit that any rise in the water level attributable to the project was actionable under state law. *Cooley* v. *Clifton Power Co.*, 747 F.2d 258 (4th Cir. 1984). This decision was followed by an award of $89.50 in damages, an injunction regulating the level of the stream at her property, and contempt proceedings to enforce this injunction. See Pet. App. 4a-5a.

sibility that it was not authorized by Section 23(b) to require Clifton to obtain a license.[4]

2. a. On June 6, 1985, the Commission issued an order granting Clifton's application for a license (Pet. App. 65a-80a). Although it no longer claimed that Section 23(b) of the Act required Clifton to obtain a license, the Commission determined that its "authority under Section 4(e) [16 U.S.C. 797(e)] to issue licenses is broader than the prohibition against unlicensed construction or operation contained in Section 23(b)." *Ibid.* Accordingly, it held that Clifton "may seek, but is not required to obtain, a license for its Clifton Mills project" (Pet. App. 68a). The Commission then canvassed a variety of considerations relevant to Clifton's fitness for a license—among them, Cooley's concerns, the safety and adequacy of the project, and environmental considerations. It concluded that issuance of the license was in the public interest and that, upon compliance with its terms, the project would be "best adapted to a comprehensive plan for development of the Pacolet River Basin for beneficial public uses" (Pet. App. 72a). The Commission also acknowledged that the license would give Clifton the power, under Section 21 of the FPA, 16 U.S.C. 814, to acquire through eminent domain that portion of Cooley's land necessary for the operation of the project. Pet. App. 72a.[5]

---

[4] *Clifton Power Corp.*, 31 F.E.R.C. ¶ 61,279 (1985).

[5] The Commission upheld this ruling on rehearing (Pet. App. 60a-62a). Although the possibility of Clifton's exercising the power of eminent domain appears to lie at the heart of petitioner's pursuit of this litigation, this question was not presented to the court of appeals and is not before this Court.

b. Cooley requested rehearing. In denying that request, the Commission elaborated on the reasons for its determination that it had authority to issue a license under Section 4(e), even though one was not required under Section 23(b). Pet. App. 20a-64a. The Commission found that the plain wording of Section 4(e) authorized the licensing of all projects within its scope (Pet. App. 22a-25a), concluded that the legislative history "is consistent with and even supports the plain wording of Section 4(e)" (Pet. App. 31a), and found no consistent or established prior agency interpretation that contradicted its understanding of the statute (Pet. App. 37a-40a). The Commission also rejected petitioner's contention that permitting licensing under Section 4(e), where it was not required under Section 23(b), would encourage attempts by third-parties to obtain licenses for projects owned by others, with a view to acquiring those projects through eminent domain. The Commission found that such projects are already susceptible to applications for licenses which propose new construction or generating capacity, and that in any event the Commission would not grant third-party applications where they were not in the public interest or without the project owner's having had an opportunity to protect its interest. Pet. App. 40a-41a.

3. The court of appeals affirmed (Pet. App. 1a-19a). At the outset, it ruled that the "plain language" of Sections 4(e) and 23(b) "[did] not support Cooley's interpretation" (Pet. App. 8a). The court contrasted the language of the second sentence of Section 23(b), which applies only to persons "intending to construct" projects and has thus been held consistently to apply only to projects built after the

Act's passage in 1935, with Section 4(e), which contains no similar language. It concluded that the statute's "plain language gives no indication that Congress intended to limit the Commission's power to grant licenses, as opposed to its § 23(b) authority to require them, to post-1935 projects." Pet. App. 8a.

The court of appeals also agreed with the Commission that the legislative history "buttresses the plain language of the statute" (Pet. App. 8a). The court noted that, under Section 23(b)'s pre-1935 precursor (see Pet. App. 8a n.10), an applicant could not be required to obtain a license for a project on a nonnavigable stream unless it voluntarily filed a declaration of intention, thereby submitting itself to the Commission's jurisdiction; Section 4(e)'s predecessor in turn authorized the issuance of licenses to these "voluntary licensees." But because this "purely voluntary scheme had proved inadequate for the development of a comprehensive system of water power regulation" (Pet. App. 9a), Section 23(b) was added in 1935 to require licenses for all subsequent projects that were subject to Congress' power under the commerce clause. Finding no indication that Congress had thereby intended to remove the Commission's existing authority to issue licenses to "voluntary licensees" for pre-1935 projects, the court reasoned that "it is unreasonable to assume that Congress clandestinely prohibited licensing of an entire category of unlicensed projects, contrary to its clear goal of expanding federal regulation." Pet. App. 9a (footnote omitted). It found, further, that petitioner's interpretation of the statute would "undermine substantially Congress' avowed desire for comprehensive federal regulation of hydropower

projects" by forbidding all licensing of pre-1935 projects on nonnavigable waters (Pet. App. 10a).[6]

The court next rejected petitioner's claim that the Commission's orders in this matter departed from the agency's prior interpretation of Section 4(e). The court agreed with the Commission that although the precise issue had not been decided in prior orders, "the mere absence of such precedent is not the same as a prior inconsistent interpretation" (Pet. App. 12a). Citing *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648 (1950), it ruled that the Commission could now exercise authority that Section 4(e) confers even if it had not previously done so (Pet. App. 13a).

Finally, the court of appeals rejected petitioner's argument that the Commission's reading of Section 4(e) "puts pre-1935 project owners at risk because volunteer applicants need not be project owners" (Pet. App. 13a). The court noted that a similar "theoretical threat" to owners of pre-1935 projects was present even under petitioner's interpretation, but that there had been "no cited evidence of massive abuses" (Pet. App. 13a). The court also observed that an owner faced with an application by a non-owner could oppose it or file a competing application, and that any non-owner application would have to meet the Commission's public interest standard (*ibid.*). The court of appeals concluded that "nothing in the statute's language, history, structure or purpose gives any indication that Congress intended to limit the FERC's existing jurisdiction to grant

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[6] The court of appeals also marshalled support for its conclusion in committee hearings and amendments to related sections of the Act (Pet. App. 10a-12a).

licenses voluntarily when it amended the Act in 1935" (Pet. App. 14a).

ARGUMENT

The court of appeals, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), held that the Commission's reading of its Section 4(e) authority "is a reasonable one, not contrary to any discernible congressional intent" (Pet. App. 14a). This holding is not in conflict with any decision of this Court or of any other court of appeals and does not otherwise warrant further review.

1. Contrary to petitioner's suggestion (*e.g.*, Pet. 4), there is no conflict in letter or spirit between the court of appeals' decision and *Farmington River Power Co.* v. *FPC*, 455 F.2d 86 (2d Cir. 1972), or *Puget Sound Power & Light Co.* v. *FPC*, 557 F.2d 1311 (9th Cir. 1977). Those cases do not hold that the Commission "lacks jurisdiction" over projects constructed prior to 1935 on nonnavigable waterways. Rather, as the court of appeals put it, *Farmington* and *Puget Sound* hold only that "the Commission may not *require* licenses for projects built entirely before 1935," not that "the Commisison may not *grant* licenses voluntarily sought for projects of such advanced age" (emphasis in original). Pet. App. 7a. The question whether Section 4(e) confers power to grant licenses where not required by Section 23(b) was neither presented nor discussed in *Farmington* or *Puget Sound.*

2. Petitioner also contends that "no evidence appears on the face of the statute that Congress intended such an optional scheme of licensing jurisdiction for this class of projects." Pet. 9. However, the

language of the statute is all-encompassing. It authorizes the Commission to issue "licenses * * * for the purpose of constructing, operating, and maintaining dams * * * or other project works * * * across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States." See page 2, *supra*. There is nothing in this section which limits the Commission's authority to projects constructed after 1935, as there is in Section 23(b). It would be particularly anomalous, as the court of appeals found, to construe this inclusive language to withdraw pre-existing authority to license plants built before 1935. As the court of appeals stated, petitioner's interpretation (Pet. App. 10a):

> would undermine substantially Congress' avowed desire for comprehensive federal regulation of hydropower projects by forbidding the licensing of all projects constructed prior to 1935 no matter how great their effects on interstate commerce or the desires of their owners or operators to come within the federal regulatory laws.

Cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946) (Act's purpose is to establish "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation").

3. Nor does the holding of the court of appeals, as petitioner maintains (Pet. 5), have the "anomalous effect" of "target[ing]" pre-1935 projects for license applications by "strangers." The fact that such applications can be filed does not mean that they will invariably be granted: where no valid

public purpose is served, an application will be denied. Further, an owner faced with a license application for its project can protect itself by opposing the application or filing a competing application. Pet. App. 13a. As the court of appeals observed, there is no evidence that the "theoretical threat" that non-owners may file applications for licenses to improve projects owned by others, which exists even under petitioner's view of the Act, has led to "massive abuses" (Pet. App. 13a). In any event, in this case, any threat from non-owner applicants is purely hypothetical. Petitioner is not a project owner trying to defeat a non-owner's application for a license to use her property. Even if that situation were deserving of this Court's attention, this case does not present it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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